

1 [The military commission was called to order at 0941, 13 August
2 2008.]

3 MJ [COL HENLEY]: The commission is called to order. Mr. Jawad
4 can you hear me?

5 All parties present before the recess are again present
6 with the following exceptions, Colonel Morris is absent and my
7 understanding is permanently excused.

8 TC [LTC VANDEVELD]: That's correct, Your Honor.

9 MJ [COL HENLEY]: In his place, we appear to have an assistant
10 trial counsel. Your full name, detailing, and qualifications please?

11 TC [LTC STEVENSON]: Yes, sir. Your Honor, my name is Douglas
12 M. Stevenson, Lieutenant Colonel, United States Air Force. I have
13 been detailed to this proceeding by Colonel Lawrence Morris, the
14 Chief Prosecutor, OMC-P. I have been sworn. I am properly qualified
15 and certified by all appropriate rules and guidelines by the Judge
16 Advocate General of the United States Air Force.

17 MJ [COL HENLEY]: Thank you. We also appear to have an
18 assistant defense counsel. Full name, detailing, and qualifications
19 please?

20 DC [LCDR DOXAKIS]: Yes, Your Honor, my name is Lieutenant
21 Commander Katherine Doxakis. I've been detailed to this case by the
22 Chief Defense Counsel, Colonel David, and the detailing memo has been

1 previously provided to the commission. I have been certified under
2 Article 27b of the UCMJ and sworn under Rule 11 of the
3 Regulations for Military Commission.

4 MJ [COL HENLEY]: Thank you, Counsel. Welcome. In an RMC 802
5 conference immediately before this session, attended by all counsel,
6 I discussed what we intended to accomplish today and tomorrow. It is
7 my understanding that the competency examination was complete. Major
8 Frakt has been provided a full copy of the evaluation, is that true,
9 Major Frakt?

10 DC [MAJ FRAKT]: Yes, Your Honor.

11 MJ [COL HENLEY]: The short form findings will be appended to
12 the record of trial as the appellate exhibit next in order. We
13 discussed D15, the defense motion to produce witnesses. I indicated
14 that the government would produce General Zanetti, Major Orlich,
15 Doctor Meneley, Special Agent Birt, Lieutenant Colonel Zierhoffer,
16 and Professor Morris. It is my understanding that General Zanetti is
17 on his way. Do we know his whereabouts, Trial Counsel?

18 TC [LTC VANDEVELD]: We don't, sir. I checked back after our
19 session, the staff judge advocate personally went--was dispatched--
20 dispatched himself to get General Zanetti and bring him immediately
21 to the commission building, and he was basically told that the
22 commission was on hold.

1 MJ [COL HENLEY]: Apparently General Zanetti is relevant to
2 Defense 4, the Unlawful Influence Motion. Yes, Major Frakt?

3 DC [MAJ FRAKT]: That's correct, Your Honor.

4 MJ [COL HENLEY]: Were there other witnesses on the unlawful
5 influence motion that you could call, Major Frakt?

6 DC [MAJ FRAKT]: Well, we had anticipated a--requested to call
7 Colonel Morris, the Chief Prosecutor, we would request a brief. I
8 understand that he is tied up in the Khadr hearing today so I'm not
9 sure his availability, but we would like to talk to him for a few
10 minutes prior to--in order to determine if, indeed, he does have a
11 relevant testimony to provide. There are a couple matters that--we
12 would like to augment D015 with some new information if the court
13 would permit.

14 MJ [COL HENLEY]: Proceed.

15 DC [MAJ FRAKT]: As I mentioned in the reply to the response to
16 D015, the defense has actually been affirmatively obstructed from
17 talking to certain witnesses, and there appears to be a standing
18 order from--we don't know if it is generated from the JTF GTMO Legal
19 Office or from the JTF GTMO Commander, himself, but the order is that
20 the defense counsel are not permitted to speak to any JTF GTMO
21 personnel. And we were advised--and to just make sure that really
22 was true, on Monday when we arrived, we called----

1 MJ [COL HENLEY]: Major Frakt, can I stop you please?
2 Apparently, General Zanetti is here. Can we hear from him and return
3 to your----

4 DC [MAJ FRAKT]: Yes, sir, that's fine.

5 MJ [COL HENLEY]: ----problem with talking to other witnesses.

6 DC [MAJ FRAKT]: May we have a brief recess to talk to General
7 Zanetti or should--otherwise we are just winging it, which is--I'm
8 willing to do that, if that's what you would prefer.

9 MJ [COL HENLEY]: Why don't we do this instead of taking a
10 recess? Why don't we recess in place? You can have 5 minutes to
11 talk to General Zanetti. If you need more time, you can request it,
12 but I would rather not take a full recess such that we need to----

13 DC [MAJ FRAKT]: Understand, Your Honor.

14 MJ [COL HENLEY]: ----take Mr. Jawad back-and-forth, is that
15 acceptable?

16 DC [MAJ FRAKT]: That's acceptable. May I be excused from the
17 courtroom?

18 MJ [COL HENLEY]: Trial Counsel, any problems with that?

19 TC [LTC VANDEVELD]: No, Your Honor.

20 MJ [COL HENLEY]: The court is in recess.

21 [The military commission recessed at 0947, 13 August 2008.]

22 [END OF PAGE]

1 [The military commission was called to order at 1001, 13 August
2 2008.]

3 MJ [COL HENLEY]: The commission is called to order. All
4 parties present before the recess are again present.

5 Major Frakt, call your witness please.

6 DC [MAJ FRAKT]: The defense calls Brigadier General Zanetti,
7 please swear the witness.

8 **BRIGADIER GENERAL ZANETTI, U.S. ARMY, was called as a witness for the**
9 **defense, was sworn, and testified as follows:**

10 **DIRECT EXAMINATION**

11 **Questions by the defense counsel:**

12 Q [MAJ FRAKT]: General Zanetti, could you please state your
13 full name and spell it for the court reporter, please?

14 A [BG ZANETTI]: Gregory J. Zanetti, Z as in Zebra-A-N-E-T-T-I.

15 Q [MAJ FRAKT]: And what is your current duty position?

16 A [BG ZANETTI]: Deputy Commander JTF GTMO.

17 Q [MAJ FRAKT]: When did you assume that position?

18 A [BG ZANETTI]: January 26, this year, 2008.

19 Q [MAJ FRAKT]: In that position have you had occasion to have
20 interaction with Brigadier General Thomas Hartmann?

21 A [BG ZANETTI]: Yes, on several occasions.

22 Q [MAJ FRAKT]: How would you describe your relationship with
23 General Hartmann?

1 A [BG ZANETTI]: It started out well, and now, it is
2 nonexistent.

3 Q [MAJ FRAKT]: Did you attend or--strike that--did General
4 Hartmann ever schedule meetings for you and other general and flag
5 officers?

6 A [BG ZANETTI]: Yes.

7 Q [MAJ FRAKT]: Can you tell us how those came about?

8 A [BG ZANETTI]: Well, what would happen is, first, we would get
9 an e-mail that would say he wanted to schedule an SVTC, secret video
10 teleconference, to talk about the cases, and that he only wanted
11 general or flag officers to attend. And, you know, here was the
12 time, the date, and please be there, and Admiral Busby and I would
13 attend.

14 Q [MAJ FRAKT]: And did he specifically exclude lower ranking
15 officers?

16 A [BG ZANETTI]: Yes, it was surprising. If there were other
17 ranking officers in the room, he would have them dismissed.

18 Q [MAJ FRAKT]: Did that include your Command Staff Judge
19 Advocate, Captain McCarthy?

20 A [BG ZANETTI]: Yes.

21 Q [MAJ FRAKT]: And when were these secure video teleconferences
22 to the best of your recollection?

23 A [BG ZANETTI]: February, March, maybe early April.

1 Q [MAJ FRAKT]: Was there another one in late June?

2 TC [LTC VANDEVELD]: Objection, leading. I'm sorry, sir,

3 objection leading.

4 MJ [COL HENLEY]: Overruled.

5 A [BG ZANETTI]: Actually, I don't know. By then, I had been

6 excluded from this process.

7 Q [MAJ FRAKT]: But you recall February, March, and April?

8 A [BG ZANETTI]: Yes.

9 Q [MAJ FRAKT]: Of '08?

10 A [BG ZANETTI]: Yes.

11 Q [MAJ FRAKT]: Were there face-to-face meetings as well with

12 General Hartmann?

13 A [BG ZANETTI]: Well, I met with him several times here on the

14 island and up in Washington, D.C. once.

15 Q [MAJ FRAKT]: And were some of those meetings also the general

16 officer, flag officer only?

17 A [BG ZANETTI]: Well, part of that, yes, but it was just to

18 meet and talk about how the Commission Support Group, which is what I

19 was charged with, by Admiral Busby, putting together, would interface

20 with the Office of Military Commissions, and how we would serve in

21 the support role to make sure this process went smoothly.

22 Q [MAJ FRAKT]: What was General Hartmann's demeanor towards

23 your personnel and your command support group?

1 A [BG ZANETTI]: Abusive, bullying, unprofessional.

2 Q [MAJ FRAKT]: Was there anyone, in particular, that he took
3 his wrath out on?

4 A [BG ZANETTI]: No, it was pretty much across the board.
5 Colonel Judkins was really the point man here with the Commission
6 Support Group serving as, you would say, almost a battalion commander
7 to put this together. And so he was the day-to-day recipient of the
8 wrath of General Hartmann, and so on several occasions, Colonel
9 Judkins actually came over to my house at night distraught, upset,
10 over, I'll say, abuse--verbal abuse that came from General Hartmann,
11 down directly to Colonel Judkins.

12 Q [MAJ FRAKT]: Did you believe that that abuse was warranted?

13 A [BG ZANETTI]: No, I thought the Commission Support Group was
14 doing an amazing job, and for those of you who weren't here 6-7
15 months ago to see what it was then versus what it is now, I hope you
16 are pleased with the progress that's--Colonel Judkins and his team
17 really pulled that off.

18 Q [MAJ FRAKT]: What role did General Hartmann seem to be taking
19 in the commission process?

20 A [BG ZANETTI]: From my perch, it was everything. To me, he
21 was in charge of the commissions.

22 Q [MAJ FRAKT]: He seemed to be running the whole commission
23 process.

1 A [BG ZANETTI]: He even wanted to run the Commission Support
2 Group, so, yes, I mean he is the only contact I ever had except
3 occasionally like Colonel Kelly, but really it was General Hartmann.

4 Q [MAJ FRAKT]: You said that he wanted control of the Command
5 Support Group or the Commission Support Group?

6 A [BG ZANETTI]: On more than one occasion, he said that he
7 wanted to take charge of my soldiers or sailors, and that he would
8 direct everything in the support role. It was interesting
9 conversations with him after that.

10 Q [MAJ FRAKT]: So was he micromanaging?

11 A [BG ZANETTI]: "Nano-managing" might be a better word.

12 Q [MAJ FRAKT]: So even to a greater extent than micromanaging?

13 A [BG ZANETTI]: Yes.

14 Q [MAJ FRAKT]: And did that include things like trying to
15 personally allocate cars and cell phones and things like that?

16 A [BG ZANETTI]: Yes, he wanted to takeover. There is something
17 like a Prime Beef unit here, they are the Air Force engineers down
18 there working the tents and so on; he wants them to fall under his
19 authority as an attorney, from 1,000 miles away.

20 I had discussions with him about unity of command and why
21 it was important that we really just have one chain of command for
22 support to which he replied he really didn't agree with unity of
23 command. Well, as a principle, that's kind of been around since

1 Alexander the Great. Most military people understand this one, but
2 General Hartmann really wanted to run things.

3 Q [MAJ FRAKT]: And prior to these meetings, these secured video
4 teleconferences, you mentioned that, in our meeting a moment ago that
5 he took on a cloak of importance?

6 A [BG ZANETTI]: Yes, I mean this is all just opinion, some
7 people wear a star to assist and help and they see their role as,
8 "What can I do to help the troopers," some people see the role of,
9 "What can you do for me". I believe General Hartmann was the latter.

10 Q [MAJ FRAKT]: At these meetings, did General Hartmann lay out
11 prosecution plans for swearing of future cases?

12 A [BG ZANETTI]: Yes, he pretty much told us the schedule of
13 what was coming down the pike, yes.

14 Q [MAJ FRAKT]: And did he have specific plans for things to go
15 to through the trial?

16 A [BG ZANETTI]: I believe so, we were kind of joking about it
17 here that the strategies seem to be spray and pray. It is just
18 charge everybody, let's go, speed, speed, speed, and in some ways, we
19 kind of respected it because the process hadn't been moving and to
20 General Hartmann's credit, he got this thing going.

21 On the other hand, there were second and third order
22 effects of pushing this so fast that--without regard for other

1 agencies' constraints or boundaries, that was putting us in some
2 untenable positions.

3 Q [MAJ FRAKT]: Were there some specific records that he was
4 particularly interested in getting a hold of?

5 A [BG ZANETTI]: He wanted medical records; he wanted ICRC
6 records; he wanted the intelligence records. And he wanted us to
7 just give them to him wholesale and it was just--he would tell me,
8 "If this were the civilian world, and if I wanted medical records, I
9 would go into a hospital, I would just demand them, and they would
10 hand them over to me."

11 Well, this isn't the civilian world, and we have doctors,
12 and privacy, and things that we have to protect here because of whom
13 we--whom we guard. And so, we understood that the medical records
14 were going to become part of this process. It was just the way in
15 which we turned it over had to be vetted so that we could put the
16 Medical Group at ease that they would have their equity protected.

17 General Hartmann almost had a blind spot towards seeing
18 other agencies' constraints and boundaries. It was the same with the
19 intelligence records. He wanted wholesale release of all of the
20 intelligence. Oh my goodness, you can't do that, but that was what
21 he was demanding almost not even knowing what he was asking for.
22 It's 2 million pages at the time, it's probably more now. What were

1 you going to do with that? How are we going to do this? How are we
2 going to protect other agencies equity in this again?

3 But we had a meeting, and actually, it was a room right
4 upstairs here with Captain Meneley. I brought Captain McCarthy along
5 to take notes. That drove General Hartmann crazy. Two more
6 attorneys and Paul Rester, I'm sorry----

7 Q [MAJ FRAKT]: And Captain McNeely was the chief of your
8 medical staff?

9 A [BG ZANETTI]: He is.

10 Q [MAJ FRAKT]: And Paul Rester is?

11 A [BG ZANETTI]: He is the head of the JIG, Joint Intelligence
12 Group.

13 Q [MAJ FRAKT]: And what took place at this meeting?

14 A [BG ZANETTI]: Well, the genesis of it was, General Hartmann
15 had been expressing his frustration as we stiff armed or blocked
16 attempts to get the wholesale release, and finally, I called him and
17 said, "Tom, next time you are here on island, let's just get
18 everybody together, and let's see if we can find a way to work
19 through this." And he agreed, so I called everybody together, and
20 what I thought would be a professional, unemotional discussion
21 degraded rather quickly. It looked more like a cross-examination in
22 my book. I'm not an attorney, but it was horrible.

1 General Hartmann lit into Captain Meneley, "I want those F-
2 --ing records," and it was a lot of F-bombs, profanity, very
3 unprofessional. I was stunned and then about part way through it, he
4 actually asked for a break. We went out into the hall, and he said,
5 "What is McCarthy doing here? Why is he taking notes". At that
6 point, I sure wanted McCarthy taking notes, so----

7 MJ [COL HENLEY]: General Zanetti.

8 WIT [GEN ZANETTI]: Yes?

9 MJ [COL HENLEY]: Slow down just a bit, so we can get the
10 translation. Thanks.

11 DC [MAJ FRAKT]: I should have explained that to you, sir.
12 Everything you say is translated into the headphones for Mr. Jawad's
13 benefit. I'm sure you knew that, but sometimes it takes a moment for
14 the interpreter to catch up. So I will try to slow down with the
15 questions.

16 Q [MAJ FRAKT]: Captain McCarthy was your Staff Judge Advocate?

17 A [BG ZANETTI]: Correct.

18 Q [MAJ FRAKT]: You brought him along to take notes?

19 A [BG ZANETTI]: Right.

20 Q [MAJ FRAKT]: And General Hartmann specifically objected to
21 that?

22 A [BG ZANETTI]: Oh, yes, but I overruled his objection, and
23 Captain McCarthy stayed in the room and continued to take notes. And

1 I will hand it to Captain Meneley; he was a rock, just solid, stood
2 his ground, very professional and respectful back.

3 So then, he started to go down the same path with Paul
4 Rester. Paul Rester is a great guy, and he's got the things--you
5 can't bully Paul Rester. And he pretty much started going into the
6 history of everything, going back to 1971 almost. I think that he
7 kind of overwhelmed General Hartmann actually.

8 But just as I was leaving that meeting, and again, it had
9 ended poorly, I walked out into the hall to talk to somebody and left
10 General Hartmann alone in the room. General Hartmann ripped into
11 them. "You don't have your one star here to protect you anymore.
12 Well, I'll tell you this, we are going to get those records." So I
13 came back in after General Hartmann had left. I actually felt bad, I
14 had failed the team because I should have protected them, and it
15 still bothers me. That was my responsibility to have sheltered them
16 somewhat from the abuse of General Hartmann and I didn't do it, but I
17 swore it would never happen again.

18 Q [MAJ FRAKT]: Now, you said, General, that your relationship
19 with General Hartmann deteriorated. Then did you try patch things up
20 at anyone's direction?

21 A [BG ZANETTI]: Well, even after that meeting, we stayed in
22 some contact, but he was getting more frustrated with me because
23 after I had seen that display, I began to connect the dots with

1 Colonel Judkins' state of being upset. And so, I directed Colonel
2 Judkins, I said, "You will not talk with him directly anymore. If he
3 fires the phone call straight down, your answer will be, 'I'll pass
4 it up, I'll pass it up, I'll pass it up,' and Eric, I will be the
5 point of contact. I will do my job and shelter you from this guy."

6 Well, that did not sit well with General Hartmann, so he
7 was upset with me already calling up, and said, "I understand I can't
8 call down there even to talk to Eric anymore." "That's right." It
9 was going downhill pretty quickly at that point.

10 Q [MAJ FRAKT]: When your new boss--did you discuss your
11 concerns with your commander, the JTF GTMO commander?

12 A [BG ZANETTI]: Oh, yeah, I mean after every meeting, of
13 course, I would go back in and back brief Admiral Busby, who would
14 kind of chuckle and say, "Better than you than me, shipmate."
15 Because Admiral Busby, and I'm speaking for him and it's not fair,
16 Admiral Busby was happy that I had taken on this role. And when it
17 really all fell apart was when we had the first--I guess it was the
18 first hearing or the first motions down at the new courtroom, and
19 Major, I understand you were there, and remember everything broke
20 down? The courtroom didn't work.

21 Q [MAJ FRAKT]: Sir, you are referring to the May 7----

22 A [BG ZANETTI]: May 7th.

1 Q [MAJ FRAKT]: ----hearing in the case of Al Bahlul where the
2 lights went out, the sound wasn't functioning very well, that type of
3 thing?

4 A [BG ZANETTI]: Oh, yeah, it was a fiasco so, I was up in
5 Mayport, and I heard about what had happened here, and I thought, "I
6 see what's coming. Hartmann is going to light into my guys, and I'm
7 not there." So I called General Hartmann and said, "Don't you dare."
8 I said, "They worked too hard. They've been through too much--too
9 many things. We will get to the bottom of this. We will get this
10 repaired," and that's when really almost a shouting match occurred,
11 and I will never forget it.

12 He said, "General Zanetti, we've got no support at all from
13 the Commissions Support Group." My mouth about dropped. "I'm going
14 to take over this thing, and if you have to tell yourself that CSG
15 has done a good job for your own self-esteem, well, you go ahead and
16 do that." I about leapt through the phone, but nonetheless, the
17 conversation ended badly, and that's--that's when it really all fell
18 apart.

19 Q [MAJ FRAKT]: And do you have self-esteem problems?

20 A [BG ZANETTI]: I hope not anyways. So after that, I went back
21 to see Admiral Busby and explained to him what had occurred, and he
22 said, "Greg, I need you to reengage." He said, "Be professional,
23 let's try to repair this thing."

1 So General Hartmann and I had a regularly scheduled
2 Wednesday one o'clock update phone call. And we have been insisting
3 that he have a liaison down here on island, and he wouldn't get one
4 because I think he wanted to run it from D.C., but I continued to e-
5 mail and said, "Tom, I'm going to call you today, give you the
6 update," and then the e-mail would comeback, "I'm going to be a bit
7 busy. I'm going to be in a meeting, busy, sorry can't do, return,
8 okay." Next week, call up, the phone would ring, I would leave a
9 message. Anyways 3, 4 weeks of this went by, and that was that.

10 Q [MAJ FRAKT]: So General Hartmann wouldn't take your calls
11 even when you had a regularly scheduled----

12 A [BG ZANETTI]: Right.

13 Q [MAJ FRAKT]: ----time? So to sum up, did you feel that his
14 style was abusive, demanding, and curse-word laden?

15 A [BG ZANETTI]: And unprofessional, yes.

16 Q [MAJ FRAKT]: And he seemed to be running the whole process?

17 A [BG ZANETTI]: Yes.

18 Q [MAJ FRAKT]: And he wanted to take over even the eye of the
19 whole island?

20 A [BG ZANETTI]: Yes.

21 Q [MAJ FRAKT]: And you weren't ever dealing with the Chief
22 Prosecutor, Colonel Morris, on any of these records issues?

23 A [BG ZANETTI]: Never.

1 DC [MAJ FRAKT]: One moment, Your Honor.

2 [Defense counsel conferring with other counsel.]

3 Q [MAJ FRAKT]: And you referred to a Lieutenant Colonel Eric
4 Judkins?

5 A [BG ZANETTI]: Right.

6 Q [MAJ FRAKT]: What is his role?

7 A [BG ZANETTI]: Well, he was the Director of the Commissions
8 Support Group. So he is a New Mexico National Guardsman, who I
9 actually chose just for this role. I had come out here in August of
10 last year, and knowing that we were going to get this mission, and it
11 wasn't hard to see what was coming down the road at us.

12 So Eric was not actually on our list to come, but Eric is
13 the best Lieutenant Colonel Battalion Commander I had in New Mexico
14 by far. So I called him. As soon as I got off the island and got to
15 Miami, I called and said, "Eric,"--even before I called my wife,
16 "Eric, I need you to come on this mission, and you're going to do
17 this one role. You are going to pull up this Commissions Support
18 Group because these trials are going to be a big deal, and we have
19 got to do this right." So Eric was the guy, and I am real proud of
20 him.

21 Q [MAJ FRAKT]: And in your view he was doing extremely good
22 work?

1 A [BG ZANETTI]: It just wasn't my view. The media commented
2 about how things were changing. Attorneys were talking about how
3 things were changing. Things got more efficient, badging procedures
4 got better, the whole thing came together in a matter of months
5 because of Judkins and his team.

6 Q [MAJ FRAKT]: And you said that General Hartmann had reduced
7 Colonel Judkins to a puddle?

8 A [BG ZANETTI]: Oh, he was--Eric was pretty upset. He would
9 come over to the house, "Sir," I'm just an azimuth check, "are we
10 doing okay? What's going on". You could just see the confidence
11 draining from the guy, and, "Eric, you're doing great, we love what
12 you're doing. It's fantastic work." But it was almost like
13 counseling sessions, let's get this tabbed out, Airborne Ranger
14 Infantry, Lieutenant Colonel back up, but it was hard dealing with
15 General Hartmann.

16 Q [MAJ FRAKT]: Was General Hartmann's behavior unusual, in your
17 opinion?

18 A [BG ZANETTI]: I have never seen a general officer behave that
19 way.

20 DC [MAJ FRAKT]: Thank you. Nothing further.

21 TC [LTC VANDEVELD]: May I cross-examine?

22 MJ [COL HENLEY]: Yes, please.

23

1 **CROSS EXAMINATION**

2 **Questions by the trial counsel:**

3 Q [LTC VANDEVELD]: General Zanetti, I am the lead prosecutor in
4 this case, you and I have never spoken before have we?

5 A [BG ZANETTI]: No.

6 Q [LTC VANDEVELD]: And you are a New Mexico National Guardsman,
7 is that right?

8 A [BG ZANETTI]: I am.

9 Q [LTC VANDEVELD]: What do you do in civilian life?

10 A [BG ZANETTI]: I am a money manager.

11 Q [LTC VANDEVELD]: What firm do you work for?

12 A [BG ZANETTI]: I actually just sold my business, Financial
13 Network Investment Corporation. I'm kind of retired right now.

14 Q [LTC VANDEVELD]: In the military, have you ever served
15 overseas?

16 A [BG ZANETTI]: I have served 6 years in Germany, I was
17 commissioned in 1980, and I served, well, let's see, six years active
18 duty, four and half years in Germany.

19 Q [LTC VANDEVELD]: How about in Afghanistan or Iraq?

20 A [BG ZANETTI]: Nope, never deployed to Afghanistan or Iraq.

21 Q [LTC VANDEVELD]: What was your basic branch when you were
22 commissioned?

23 A [BG ZANETTI]: Field Artillery.

1 Q [LTC VANDEVELD]: And did that change?

2 A [BG ZANETTI]: It became an air defense artillery member when
3 it joined the New Mexico National Guard. We were an air defense
4 state, there wasn't much of field artillery there.

5 Q [LTC VANDEVELD]: And prior to you being promoted to Brigadier
6 General, what was your branch?

7 A [BG ZANETTI]: Air Defense Artillery.

8 Q [LTC VANDEVELD]: Are you familiar with the Military
9 Commissions Act?

10 A [BG ZANETTI]: Somewhat, but not really.

11 Q [LTC VANDEVELD]: Are you familiar, generally, with the Manual
12 for Military Commissions?

13 A [BG ZANETTI]: No.

14 Q [LTC VANDEVELD]: Do you have any idea who is responsible for
15 the logistical support to the prosecution under the Military
16 Commissions Act or the Manual for Military Commissions?

17 A [BG ZANETTI]: No.

18 Q [LTC VANDEVELD]: Can you say for certain that it is the Joint
19 Task Force Guantánamo that is responsible for it under those laws or
20 regulations?

21 A [BG ZANETTI]: Well, it is my understanding we are. I mean
22 certainly that's what our role was. We were given the mission to do

1 Commissions Support Group in support of Office of Military

2 Commissions, yes.

3 Q [LTC VANDEVELD]: And you were given a mission by whom?

4 A [BG ZANETTI]: Admiral Busby.

5 Q [LTC VANDEVELD]: Do you know where Admiral Busby got the
6 mission?

7 A [BG ZANETTI]: No, I assume from--I don't know.

8 Q [LTC VANDEVELD]: Well, would it surprise you to learn that
9 the convening authority for the military commissions is responsible
10 for logistical support to the commissions?

11 A [BG ZANETTI]: Yes.

12 Q [LTC VANDEVELD]: That would surprise you?

13 A [BG ZANETTI]: Yes. I guess so. I guess when you say it now,
14 I think, "Okay, I guess I can understand that."

15 Q [LTC VANDEVELD]: Well, would you understand that General
16 Hartmann, who is the legal advisor to the convening authority, as you
17 know, would be concerned about the pace of logistical support that
18 would be ready when commissions cases start to come to trial?

19 A [BG ZANETTI]: We are absolutely--we are very aware of that
20 and want to be very responsive to that, of course.

21 Q [LTC VANDEVELD]: You've been--your interaction with General
22 Hartmann was approximately 5 months?

23 A [BG ZANETTI]: Yes.

1 Q [LTC VANDEVELD]: And from what you have described to me, and
2 correct me if I'm wrong, you described a different way of doing
3 business, a personality conflict, if you will, between you and your
4 ideas of leadership and General Hartmann's ideas, all of what will
5 motivate people to get the job done, does that sound right?

6 A [BG ZANETTI]: Oh, I see where you're going with this, you
7 mean to say it's a difference in leadership style? I will agree with
8 that completely, yes. We had different leadership styles.

9 Q [LTC VANDEVELD]: And you mentioned that, since you have been
10 in charge and since you have been interacting with--during the time
11 that you were interacting with General Hartmann, things at Guantánamo
12 in terms of the Commissions Support Group have improved vastly?

13 A [BG ZANETTI]: Yes.

14 Q [LTC VANDEVELD]: Something that you are proud of?

15 A [BG ZANETTI]: Very.

16 Q [LTC VANDEVELD]: Now, you don't attribute any of the speed
17 with which this has happened to General Hartmann's attitude toward
18 the pace at which the Commission Support Group had been proceeding in
19 the past?

20 A [BG ZANETTI]: In fact, I actually said that earlier. I mean
21 his ability to push this forward, no, we admired that, yes. I agree
22 that his, what's the word I want to use, enthusiasm is not the right
23 word, aggressiveness to make it happen, yes, tip of the hat.

1 Q [LTC VANDEVELD]: Did you have any contact with General
2 Hartmann before you came on board in January of 2008, sir?

3 A [BG ZANETTI]: No.

4 Q [LTC VANDEVELD]: So you don't know what he was like before
5 then?

6 A [BG ZANETTI]: No.

7 Q [LTC VANDEVELD]: You don't know what his leadership style was
8 like before then?

9 A [BG ZANETTI]: No.

10 Q [LTC VANDEVELD]: When you came on board in January 2008, was
11 the JTF Guantánamo senior leadership satisfied with the pace at which
12 the preparations for the commission cases that were obviously coming
13 down the pike--were you satisfied with the pace of that?

14 A [BG ZANETTI]: No, we knew that it had to be faster. In fact,
15 we were--as early as August, I was concerned, coming into this
16 courtroom and seeing how partially completed it was, that we had to
17 go a lot faster. I knew that even before we got here. Admiral Busby
18 knew it, that we had to put some muscle behind this thing.

19 Q [LTC VANDEVELD]: And why did you know--why did you know that?

20 A [BG ZANETTI]: I mean I hadn't talked to General Hartmann, but
21 I knew we were going to be doing trials. I wish you could have all
22 seen this place last August. It was a shell almost. And again,
23 nothing down the hill, a few tents going up, and I have been Army

1 long enough to know there is a lot of work that goes into putting,
2 basically, it's a small base together, so that this thing could come
3 off well. So no, there was a sense of urgency, which was why I made
4 that phone call to Eric, let's get the right people in the right
5 jobs.

6 Q [LTC VANDEVELD]: So you knew without speaking to General
7 Hartmann?

8 A [BG ZANETTI]: Absolutely.

9 Q [LTC VANDEVELD]: Commission cases were going to be coming
10 down the pike?

11 A [BG ZANETTI]: Well, yeah, you just read in the newspapers,
12 sure.

13 Q [LTC VANDEVELD]: So General Hartmann didn't tell you, "Hey,
14 look, I'm going to direct that X, Y, and Z cases be charged on X, Y,
15 and Z days and, by God, this thing better be ready"?

16 A [BG ZANETTI]: Well, no, back then, no, but I mean certainly,
17 he talked like that when these cases started to be charged. "We've
18 got to have this courtroom ready, this has got to be done." "Yes, we
19 understand that," and so----

20 Q [LTC VANDEVELD]: I'm sorry, sir.

21 A [BG ZANETTI]: ----so I'm just saying that it was long days,
22 long nights to put this thing together.

1 Q [LTC VANDEVELD]: So when you saw or learned from some source
2 that commission cases had started to be charged, that's when you
3 realized, as the senior leader, the pace had to be stepped up?

4 A [BG ZANETTI]: No, I knew it before that.

5 Q [LTC VANDEVELD]: Even before that?

6 A [BG ZANETTI]: Absolutely, oh yeah, we knew it was coming----

7 Q [LTC VANDEVELD]: And----

8 A [BG ZANETTI]: ----go ahead.

9 Q [LTC VANDEVELD]: Thank you, sir. And you never talked to
10 General Hartmann specifically about any particular case and that was
11 your testimony?

12 A [BG ZANETTI]: Well, no, we didn't talk about the details of
13 the case only insofar as, you know, someone is going to be charged.
14 "The 9/11 guys are going to be charged, then these guys will be
15 charged," it was that type of thing.

16 Q [LTC VANDEVELD]: And you don't know the source of his
17 knowledge about those cases?

18 A [BG ZANETTI]: No.

19 Q [LTC VANDEVELD]: You don't know if the chief prosecutor had
20 made the decision that that sort of timeline was reasonable?

21 A [BG ZANETTI]: I had no visibility on that at all.

22

1 Q [LTC VANDEVELD]: You mentioned the term "spray and pray,"
2 could you explain that to us?

3 A [BG ZANETTI]: Well, again, this is just an outside observer
4 watching this, you know, come about. It was, "Let's charge, let's
5 charge, let's charge," and "Let's get this thing moving as fast as--
6 let's charge and charge and charge and charge them, and then pray
7 that we can pull all this off." And sometimes we felt that way at
8 this end, "Oh my, we are going to charge this many people. How many
9 attorneys are coming down? Let's see if that many attorneys are
10 coming down. The ripple effect into the guard force, escorts, food,
11 things like, silly things, not silly, the hospital, what about the
12 chow halls. If we have this many people being charged, this many
13 cases--that this many people, can we support all this". So that was
14 our concern, is how do we support all of this.

15 DC [MAJ FRAKT]: Sorry to interrupt, General, and Your Honor.
16 Mr. Jawad requests a comfort break or just to be personally excused
17 to use the restroom. I'm sure we are-- are probably getting close to
18 being finished with the General. He says it is of an urgent nature.

19 MJ [COL HENLEY]: Are you almost finished, Colonel Vandeveld?

20 TC [LTC VANDEVELD]: I am almost finished, Your Honor.

21 MJ [COL HENLEY]: Can we wait 3 minutes.

22 DC [MAJ FRAKT]: Three minutes? Yes, Your Honor.

23 MJ [COL HENLEY]: Hurry up, Colonel.

1 **Questions by trial counsel:**

2 Q [LTC VANDEVELD]: So General, thank you. When you started to
3 interact with General Hartmann, you understood his concern in his
4 urgency about the logistical process?

5 A [BG ZANETTI]: Of course.

6 Q [LTC VANDEVELD]: And you may have disagreed with the way in
7 which he communicated it, but it definitely had some sort of
8 inspiring or impeding effect on your actions?

9 A [BG ZANETTI]: No, we already had that going, which was why it
10 was unnecessary. We understood the sense of urgency; we understood
11 it way in advance. We knew it was going to be, gosh, I hate to use
12 this term, "asses and elbows," let's get this thing done. And so it
13 was really more of a detriment. It made things harder. The things
14 that he would inject were just--it caused more problems than it
15 helped, that was the frustrating part.

16 Q [LTC VANDEVELD]: So as you said, you knew well in advance of
17 the time that you started to interact with General Hartmann that the
18 process would ramp up, and that things had to be done?

19 A [BG ZANETTI]: Absolutely, we all knew it.

20 TC [LTC VANDEVELD]: Thank you, nothing further.

21 MJ [COL HENLEY]: Did you have anything, Major Frakt.

22 DC [MAJ FRAKT]: One quick question.

23 **REDIRECT EXAMINATION**

1 **Questions by the defense counsel:**

2 Q [MAJ FRAKT]: General, you said you understood the convening
3 authority had a certain role in supporting the commissions process.
4 Did you ever talk to Miss Crawford, the Convening Authority?

5 A [BG ZANETTI]: No, I have never talked to her at all.

6 DC [MAJ FRAKT]: Thank you.

7 **EXAMINATION BY THE MILITARY JUDGE**

8 **Questions by the military judge:**

9 Q [COL HENLEY]: General, during these S--secured video
10 teleconferences, do you recall if General Hartmann indicated that he
11 would personally order or have charges sworn against a particular
12 detainee?

13 A [BG ZANETTI]: Well, yes, I mean that was the purpose of the
14 SVTC is that he was saying who he was going to charge and when and
15 that we should be aware of it, that it was going to be hitting the
16 press and so on.

17 Q [COL HENLEY]: So your recollection is that during these
18 SVTC's, he said he would personally charge versus charges would be
19 sworn at some point a fine distinction a bit?

20 A [BG ZANETTI]: Yes, you're right. I see where you're going.
21 I can't say that I recall that he said, "I'm going to charge," that
22 wouldn't be fair to him. I can't recall that.

23 MJ [COL HENLEY]: Thank you. Follow-up, Trial Counsel.

1 TC [LTC VANDEVELD]: No, sir.

2 MJ [COL HENLEY]: Defense?

3 DC [MAJ FRAKT]: Thank you.

4 **RE-REDIRECT EXAMINATION**

5 **Questions by the defense counsel:**

6 Q [MAJ FRAKT]: But he did give specific names of specific
7 detainees that he anticipated that would be charged in the near
8 future?

9 A [BG ZANETTI]: Yes.

10 Q [MAJ FRAKT]: That there would be press coverage?

11 A [BG ZANETTI]: Oh, yes.

12 Q [MAJ FRAKT]: And then did you see him follow that up with
13 press conferences at the Pentagon?

14 A [BG ZANETTI]: Yes.

15 Q [MAJ FRAKT]: Did he, did he ever say things at those press
16 briefings like, "We don't have a timeline"?

17 A [BG ZANETTI]: Oh, I don't remember that.

18 Q [MAJ FRAKT]: Okay. If he said at the press conference that--
19 or gave the impression that he was just learning about those cases
20 and would be taking a fresh look at them, do you think that would be
21 misleading?

22 A [BG ZANETTI]: Yes. This is--again, just to finish this up,
23 when the last time--when he testified and I heard that he had said

1 that he did not have regularly scheduled SVTC's, that--I lost a lot
2 of respect for him there; I thought he was quibbling. They may not
3 have been regularly scheduled, but they were regular SVTCs, and I
4 know that there is this fine line and maybe that is a gray area, but
5 as a general officer, as an officer, as a member of the military that
6 wasn't the whole truth. And at that point, I pretty much washed my
7 hands of respect for General Hartmann.

8 DC [MAJ FRAKT]: Thank you.

9 MJ [COL HENLEY]: General, thank you very much for your
10 testimony. You're excused. Please don't discuss your testimony with
11 anybody except for the attorneys.

12 WIT [BG ZANETTI]: Thank you, Judge.

13 [Witness withdrew from the courtroom.]

14 MJ [COL HENLEY]: Let's take 30 minutes. The commission is in
15 recess.

16 [The military commission recessed at 1037, 13 August 2008.]

17 [The military commission was called to order at 1115, 13 August
18 2008.]

19 MJ [COL HENLEY]: The commission is called to order. All
20 parties present before the recess are again present. Defense, call
21 your next witness, please.

22 DC [MAJ FRAKT]: Defense calls Major Jason Orlich.

1 TC [LTC VANDEVELD]: Major Orlich, this is Lieutenant Colonel
2 Darryl Vandeveld. I'm the lead prosecutor on this case. Could you
3 please stand and raise your right hand to be sworn?

4 **MAJOR JASON ORLICH, U.S. ARMY, was called as a witness for the**
5 **defense via Video Teleconference, was sworn, and testified as**
6 **follows:**

7 **DIRECT EXAMINATION**

8 **Questions by the defense counsel:**

9 Q [MAJ FRAKT]: Major Orlich what are you seeing on your video
10 screen there?

11 A [MAJ ORLICH]: I can see you at a podium and a number of
12 people behind you.

13 Q [MAJ FRAKT]: Okay great. And your name is spelled O-R-L-I-C-
14 H?

15 A [MAJ ORLICH]: That is correct.

16 Q [MAJ FRAKT]: Major Jason, U.S. Army?

17 A [MAJ ORLICH]: Yes.

18 Q [MAJ FRAKT]: Did you previously serve at GTMO?

19 A [MAJ ORLICH]: Yes I did from the end of November 2002 until
20 April of 2005.

21 Q [MAJ FRAKT]: What was your duty position here at GTMO?

1 A [MAJ ORLICH]: I was the Detention Operations Group S2 from
2 2002 to until 2004 and then I took over as the S3 of Interrogations
3 from the fall of 2004 until I left in April of 2005.

4 Q [MAJ FRAKT]: Could you briefly describe the functions of the
5 S2 within the Joint Detention Operations Group?

6 A [MAJ ORLICH]: Yes. Our first mission primarily was for force
7 protection and security around the camp that was our primary role to-
8 -we did threat vulnerability assessments around the camp. We also
9 provided the command with weekly updates and daily situational
10 reports on detainee activities within the camp.

11 Everything the command needed to know on who was
12 cooperating in the camp, who wasn't, detainees that may have caused
13 trouble in the camps and we also had input into the segregation
14 program and to enter the camp and that was all to promote our
15 incentives program, to promote our incentives within the camp so the
16 detainees when they cooperate. They graduate to the next level. And
17 we work closely with the operations folks within the Joint Detention
18 Operations Group.

19 Q [MAJ FRAKT]: In addition to incentives were there also
20 disincentives?

21 A [MAJ ORLICH]: Yes in Camps Two and Three where some of our
22 worst behaved detainees were, they didn't have the comfort items, the
23 level of comfort items that the detainees in Camps One and Four may

1 have, based on their cooperation. Detainees over in Camps Two and
2 Three were moved more frequently. They also--we had our maximum
3 security blocks over in Camps Two and Three. And because of the lack
4 of incentive items over there we try to promote that saying hey if
5 you cooperate, you graduate, look at how your fellow detainees are
6 living over in Camps One and Camp Four. So we really tried to
7 promote the incentives.

8 Q [MAJ FRAKT]: Was isolation in maximum security a form of
9 disincentive?

10 A [MAJ ORLICH]: We never referred to it as isolation, we just
11 called it segregation. They were segregated in the maximum security
12 units that are over in Camps Two and Three and that was obviously one
13 of the disincentives for being in Camps Two and Three.

14 Q [MAJ FRAKT]: Now during your tenure here at Guantánamo was
15 there a program referred to as the Frequent Flyer Program?

16 A [MAJ ORLICH]: Yes.

17 Q [MAJ FRAKT]: And could you briefly describe the nature of
18 that program?

19 A [MAJ ORLICH]: Yes, the Frequent Flyer Program was a program
20 that was used in Camps Two and Three because we had some of the worst
21 behaved detainees over there. The program was used to, to keep the
22 detainees from organizing with fellow detainees since many of them
23 were the biggest troublemakers in the camp. They were moved around

1 more frequently to prevent them from communicating, prevent them from
2 organizing in the camp and by keeping the detainees off balance; we
3 were able to provide some stability to reduce the assaults against
4 MPs and to stabilize Camps Two and Three. And that was one of the
5 disincentives for being in Camps Two and Three.

6 Q [MAJ FRAKT]: Did you move people as often as every three
7 hours from cell to cell?

8 A [MAJ ORLICH]: I would have to look at the SINC MATRIX, there
9 were detainees who moved around quite frequently that would not be an
10 abnormal occurrence if the detainee moved some moved more than
11 others----

12 MJ [COL HENLEY]: Major Orlich, Major Orlich stop please, we
13 have an issue.

14 DC [LCDR DOXAKIS]: Yes, Your Honor, Mr. Jawad is having trouble
15 hearing the interpretation.

16 MJ [COL HENLEY]: I will get to that in a second. I'm asking
17 the security manager do we have an issue that we need to address?

18 SEC MANAGER: Sir, Your Honor, just watch the light on
19 responses.

20 MJ [COL HENLEY]: Major Orlich, this is the judge, a couple of
21 points. We need to interpret your responses, so please shorten your
22 answers and only answer the specific question asked by Major Frakt.
23 Major Frakt let's see if we can limit the questions to the motion and

1 I understand that this is relevant to the motion, but if we need to
2 clear the courtroom, avoid clearing the courtroom I would like to do
3 that.

4 DC [MAJ FRAKT]: Yes Your Honor. Major Orlich if at anytime you
5 feel that a question that I'm asking you calls for a classified
6 response then do not answer the question and just say that, that
7 would require a classified response. Is that understood?

8 A [MAJ ORLICH]: Okay. Okay.

9 MJ [COL HENLEY]: Now, before you continue, you had an issue
10 with Mr. Jawad?

11 DC [LCDR DOXAKIS]: Yes, Your Honor, Mr. Jawad indicated that he
12 is having trouble following the interpretation. That there's
13 actually two interpreters and that one appears to be significantly
14 more effective than the other one and he would request. He wants
15 whoever was interpreting previously because that person was of
16 superior quality he could understand them.

17 MJ [COL HENLEY]: We will see what we can do.

18 DC [LCDR DOXAKIS]: Maybe slowing it down would help.

19 MJ [COL HENLEY]: Right and I have asked both the witness and
20 certainly counsel if you can slow down; shorten your questions and
21 responses that might help.

22 DC [MAJ FRAKT]: Yes, Your Honor, we will try, thank you.

1 Q [MAJ FRAKT]: Was there any written guidance to your knowledge
2 published describing the Frequent Flyer Program?

3 A [MAJ ORLICH]: Not to my knowledge.

4 Q [MAJ FRAKT]: Was the camp leadership aware that the frequent
5 flyer program was going on?

6 A [MAJ ORLICH]: Yes.

7 Q [MAJ FRAKT]: Including the Joint Detention Group Commander?

8 A [MAJ ORLICH]: Yes.

9 Q [MAJ FRAKT]: Including the Joint Task Force Guantánamo
10 Commander?

11 A [MAJ ORLICH]: Yes.

12 Q [MAJ FRAKT]: Who would have to approve a detainee being
13 subjected to the Frequent Flyer Program?

14 A [MAJ ORLICH]: Those detainees would be vetted between the S2,
15 the S3 of the Detention Operations Group, the Interrogation Control
16 Element, and the Joint Interrogation Group. There was a group--there
17 are a lot of different people who had inputs into vetting who would
18 go in there. From a detention operation group's standpoint, the
19 detainees who were in that program, they were moved for disciplinary
20 reasons based on their behavior and lack of cooperation within the
21 camp.

22 Q [MAJ FRAKT]: Do you have any idea of the number of detainees
23 who were subjected to this Frequent Flyer Program?

1 A [MAJ ORLICH]: No, I could not give you a number off the top
2 of my head.

3 Q [MAJ FRAKT]: More than 20?

4 A [MAJ ORLICH]: Yes.

5 Q [MAJ FRAKT]: More than 30?

6 A [MAJ ORLICH]: Well you have got all the camps two and three
7 so if you look at the maximum capacity of camps two and three it
8 would be more than that. Because many people that were in camps two
9 and three were moved around that was one of the disincentives for
10 being in camps two and three.

11 Q [MAJ FRAKT]: Did this program continue during your entire
12 time here at Guantánamo?

13 A [MAJ ORLICH]: It would--when I left the program was still
14 ongoing and that was April of 2005 so.

15 Q [MAJ FRAKT]: Are you aware of any order to stop the program?

16 A [MAJ ORLICH]: No.

17 Q [MAJ FRAKT]: Did you ever discuss this program with General
18 Hood?

19 A [MAJ ORLICH]: Not specifically he knew about the program, the
20 leadership knew about the program.

21 Q [MAJ FRAKT]: Including General Cannon or then Colonel Cannon?

22 A [MAJ ORLICH]: Yes, sir.

1 Q [MAJ FRAKT]: And you're saying this was basically a routine
2 part of the operations, the detention operations?

3 A [MAJ ORLICH]: This was a routine that was in our daily
4 synchronization matrix when we did all the moves within the camp and
5 it was vetted by all the people aforementioned people.

6 Q [MAJ FRAKT]: Did anyone ever question to your knowledge the
7 legality of this program?

8 A [MAJ ORLICH]: No.

9 Q [MAJ FRAKT]: You were ordered--is it true that your orders
10 were to treat detainees humanely?

11 A [MAJ ORLICH]: Yes.

12 Q [MAJ FRAKT]: Do you believe that moving detainees from cell
13 to cell on a regular basis is humane?

14 A [MAJ ORLICH]: Yes, I do. It promoted good order and
15 discipline within the camps and prevented the worst behaved detainees
16 in the camps from organizing and continuing assaults against our
17 military police force. They were tasked with safeguarding and
18 securing the detainees 24/7.

19 Q [MAJ FRAKT]: Was part of the reason for the program
20 linguistic isolation?

21 A [MAJ ORLICH]: Linguistic segregation, yes, we divided the
22 detainees up linguistically, which prevented them from communicating
23 within the camp and organizing.

1 Q [MAJ FRAKT]: Can you describe what's involved in moving a
2 detainee from one cell to another at that time?

3 A [MAJ ORLICH]: Yes, I can describe it. I wasn't responsible
4 for the actual movement, the military police and the operations group
5 had--were tasked with that duty. Usually the MPs came to the cell,
6 they moved the detainee from one cell to another cell, moving all
7 their belongings and moving them from one cell to another.

8 Q [MAJ FRAKT]: Was there shackling involved?

9 A [MAJ ORLICH]: Whenever we moved a detainee from one cell to
10 another regardless of their behavior they were restrained and moved
11 to the next cell wherever they were scheduled to go to. Whether it
12 was medical, whether it was interrogation, whether it was to another
13 cell a routine cell move, they were restrained.

14 Q [MAJ FRAKT]: Was there are also Frequent Flyer Program used
15 for intelligence gathering purposes?

16 A [MAJ ORLICH]: Yes, there was.

17 Q [MAJ FRAKT]: But that was a separate program from this
18 punishment program or disciplinary program?

19 A [MAJ ORLICH]: Yes.

20 Q [MAJ FRAKT]: One moment. Would a--prior to the decision for
21 a detainee to be placed in the Frequent Flyer Program would there be
22 any medical clearance or psychological or psychiatric clearance?

1 A [MAJ ORLICH]: There was a vetting group where you had all the
2 different groups that would vet and nominate various detainees, as
3 far as medical I can't speak for the medical folks in there input
4 whether they were vetted or not. Medical care was provided routinely
5 for all the detainees, so if that was an issue that would have
6 brought forth by the medical folks.

7 Q [MAJ FRAKT]: Did the guards complain about having to
8 administer this program?

9 A [MAJ ORLICH]: Not to my knowledge.

10 Q [MAJ FRAKT]: Were the lights on constantly in the cells at
11 that time in the 2003, 2004 timeframe?

12 A [MAJ ORLICH]: Not that I recall.

13 Q [MAJ FRAKT]: Are you saying that you don't recall or you
14 don't think that they were on?

15 A [MAJ ORLICH]: I don't recall well there was lighting on the
16 exterior of the blocks that was on all the time. You know during the
17 nighttime so the MPs could see what they were doing. I believe that
18 there were lights that went down the middle of the blocks for the
19 detainee--you know the middle of each of the blocks. I don't know if
20 there were lights in the individual cells that were on or not.

21 [Defense counsel conferring.]

22 DC [MAJ FRAKT]: Thank you Major Orlich I'm going to turn you
23 over to the prosecutor.

1 WIT [MAJ ORLICH]: Okay.

2 TC [LTC VANDEVELD]: I turn you over; he means that I get to ask
3 you some questions.

4 **CROSS EXAMINATION**

5 **Questions by the trial counsel:**

6 Q [LTC VANDEVELD]: What was the population Major Orlich of
7 camps two and three in May of 2004 approximately?

8 A [MAJ ORLICH]: I would have to do some math, let's see, one
9 moment. [Writing on paper notebook.] I would say just a rough
10 estimate; I would say 350-400.

11 Q [LTC VANDEVELD]: And out of that approximate number, in May
12 2004, how many detainees would be participating in the so-called
13 Frequent Flyer Program?

14 A [MAJ ORLICH]: I don't know.

15 Q [LTC VANDEVELD]: Is it fair to say that the 350-400 detainees
16 would not all of them be participating in the Frequent flyer Program
17 on those blocks?

18 A [MAJ ORLICH]: That's correct.

19 Q [LTC VANDEVELD]: I'm sorry, I meant in those camps.

20 A [MAJ ORLICH]: In those camps.

21 Q [LTC VANDEVELD]: Now, when detainees were moved from cell to
22 cell, after the moves were complete and a particular detainee for

1 example was in his cell at the time would anything be done to disrupt
2 his sleep or keep him awake?

3 A [MAJ ORLICH]: No.

4 Q [LTC VANDEVELD]: So is it fair to say that with the exception
5 of the time spent moving from cell to cell a detainee could literally
6 sleep all day?

7 A [MAJ ORLICH]: That's correct.

8 Q [LTC VANDEVELD]: You mentioned segregation tell us what
9 segregation entail in terms of the detainees access to others on the
10 cellblock, interaction with the guards, ability to see outside the
11 cell and so on?

12 A [MAJ ORLICH]: With segregation, what we did was we looked at
13 from a behavioral standpoint, we looked at the worst behaved
14 detainees who had a very long history established pattern of violence
15 against the military police on the blocks and what we did was for the
16 worst of the worst, we tried to segregate----

17 MJ [COL HENLEY]: Slow down, Major Orlich.

18 A [MAJ ORLICH]: ----them, yes.

19 MJ [COL HENLEY]: Slow down.

20 A [MAJ ORLICH]: Okay, I am sorry.

21 Q [LTC VANDEVELD]: Go ahead and resume.

22 A [MAJ ORLICH]: Okay, what we did was we segregated detainees
23 based on their behavior and we also segregated detainees based on

1 their language. One of the reasons, why we did this were one to
2 prevent them from communicating within the camp and organizing and
3 two was to prevent them from committing continued acts of violence
4 against the MPs. It was to promote good order and discipline and to
5 keep detainees from organizing more violence against the military
6 police on the blocks.

7 Q [LTC VANDEVELD]: When you say violence could you explain to
8 the Military Judge what you mean by that?

9 DC [MAJ FRAKT]: Objection.

10 A [MAJ ORLICH]: Yes the----

11 MJ [COL HENLEY]: Overruled.

12 Q [LTC VANDEVELD]: Go ahead and continue major.

13 A [MAJ ORLICH]: ----the detainees in camps two and three who
14 were the worst behaved detainees committed, the number of, they
15 assaulted the MPs on a daily basis that could be physical assaults
16 against the MPs. It could be throwing bodily fluids, spitting on the
17 MPs, throwing urine and feces, toilet water, food. Some of them may,
18 were able to make weapons within their cells. And we had numerous
19 injuries against our military police force.

20 So when we segregated detainees, we looked at those
21 detainees and identified who the worst of the worst troublemakers
22 were, instigators, block leaders, a number of different types of

1 detainees. We were able to categorize them and segregate them
2 appropriately to minimize the assaults against the military police.

3 Q [LTC VANDEVELD]: You mentioned the matrix; did the matrix
4 include the sort of information that would lead the detainee to be
5 placed into the Frequent Flyer Program?

6 A [MAJ ORLICH]: Yes, the detainee could be, based on their
7 previous background. And that was one of my first questions was
8 looking at the detainee's behavioral history in the camp could
9 determine whether they would be part of the frequent flyer program.
10 Many detainees were able to cooperate and graduate over to camp one
11 and even camp four an opening-bay communal living where they would--
12 and that was a non-harmful means of segregating detainees so that
13 they could be part of the incentives program, cooperate and graduate
14 onto the next camp.

15 Q [LTC VANDEVELD]: During the time that the detainees were in
16 the Frequent Flyer Program were they ever denied food?

17 A [MAJ ORLICH]: No.

18 Q [LTC VANDEVELD]: Were they ever denied medical care if they
19 had a complaint during the time they were in the program.

20 A [MAJ ORLICH]: No.

21 Q [LTC VANDEVELD]: If to your knowledge did any detainee who
22 was in the Frequent Flyer Program request medical care?

1 A [MAJ ORLICH]: If medical care was requested it was provided
2 to the detainee regardless of their behavioral level in the camp.

3 Q [LTC VANDEVELD]: How often were psychological technicians on
4 a particular cellblock if you can tell us?

5 A [MAJ ORLICH]: We had Delta block, which was where our
6 psychological technicians were if a detainee requested, if the
7 medical personnel there requested you know based on a detainees
8 request for medical help they could go to Delta block. Many
9 detainees were sent to Delta block, if they needed help. I don't
10 know the number of requests for psychological help based on people
11 who were part of the frequent flyer program, I don't know.

12 Q [LTC VANDEVELD]: What would happen if detainees' physical
13 condition or mental condition deteriorated to the point where it
14 could be observed while he was in the Frequent Flyer Program, if that
15 ever happened?

16 A [MAJ ORLICH]: Medical help would be provided.

17 Q [LTC VANDEVELD]: You mentioned that this was a disciplinary
18 program and not an intelligence program, is that right?

19 A [MAJ ORLICH]: From a detention standpoint it was, it was a
20 disciplinary program, it was a disincentive to be in camps two and
21 three, it was to promote our incentives program so that the detainees
22 would cooperate.

1 Q [LTC VANDEVELD]: Could a detainee see outside his cell while
2 he was in segregation?

3 A [MAJ ORLICH]: If he was in maximum-security in our maximum-
4 security blocks over in camps two and three, he could only see out
5 the window space in his door. If he was in a regular block outside
6 of maximum-security, he could see across to other blocks, he could
7 see detainees around him, next to him, across the block, and
8 communicate freely with them.

9 Q [LTC VANDEVELD]: Please tell us how large the windows were on
10 Lima block in May 2004?

11 A [MAJ ORLICH]: I'd say a little bit larger than 8.5 x 11.
12 There was an opening, a window and there was also an opening that we
13 would put you know meals in three times a day.

14 Q [LTC VANDEVELD]: A so called Bean hole?

15 A [MAJ ORLICH]: Yes.

16 Q [LTC VANDEVELD]: I want to ask you specifically was
17 participation on Lima block in May 2004 intended to inflict severe
18 physical or mental pain or suffering.

19 A [MAJ ORLICH]: No.

20 DC [MAJ FRAKT]: Objection.

21 MJ [COL HENLEY]: Overruled.

1 Q [LTC VANDEVELD]: Did you yourself observe at any time in May
2 2004 any detainee on Lima block suffering severe pain or mental
3 suffering?

4 A [MAJ ORLICH]: No.

5 Q [LTC VANDEVELD]: Were you instructed as to what you would do
6 in the event that you did see such suffering or pain?

7 A [MAJ ORLICH]: Oh yeah we would have medical intervene
8 immediately and usually detainees were able to convey medical
9 requests as well. MPs frequently across the camp, if a detainee need
10 a medical assistance the medical teams were there.

11 Q [LTC VANDEVELD]: And just so I'm clear, the interrogations or
12 sessions to provide intelligence where physically on the camp did
13 they occur?

14 A [MAJ ORLICH]: They were actually just outside----

15 DC [MAJ FRAKT]: Objection not relevant.

16 A [MAJ ORLICH]: ----just outside of the camp.

17 TC [LTC VANDEVELD]: Hold on sir, the defense made an objection.

18 WIT [MAJ ORLICH]: Okay.

19 MJ [COL HENLEY]: What is the objection Major Frakt?

20 DC [MAJ FRAKT]: Relevance.

21 MJ [COL HENLEY]: Your response.

22 TC [LTC VANDEVELD]: I want to be able to show that the
23 intelligence aspect took place and I don't want to lead the witness

1 to a different answer at a different location then Major Orlich has
2 testified to that.

3 MJ [COL HENLEY]: Overruled.

4 Q [LTC VANDEVELD]: Okay Major Orlich I had asked you where the
5 intelligence activities for interrogations and so forth took place in
6 relation to cellblock Lima during May 2004.

7 A [MAJ ORLICH]: Yes, they were actually outside just outside of
8 the camp where they were escorted when they needed to go to
9 interrogation. It was away from the blocks, away from the detention,
10 just outside of the gates and that's where they were interrogated.

11 Q [LTC VANDEVELD]: To your knowledge were those detainees who
12 were deemed to have some intelligence value placed in a particular
13 location within the complex?

14 A [MAJ ORLICH]: Yes and that's why the intelligence, the
15 interrogation control element also had a say in the vetting on where
16 detainees were located.

17 Q [LTC VANDEVELD]: And was Lima block one of those locations?

18 A [MAJ ORLICH]: Yes.

19 Q [LTC VANDEVELD]: Finally, were members of the guard force
20 allowed to move prisoners on their own initiative from cell to cell?

21 A [MAJ ORLICH]: No, no. All the moves, all the moves when a
22 detainee was moved from Point A to Point B, those moves had to be
23 approved in accordance with the discipline SINC MATRIX. If a

1 detainee--if the detainee misbehaved, assaulted an MP, according to
2 the standard operating procedure, the SOP that move was done in
3 conjunction, in coordination with the operation center of the camp.

4 Q [LTC VANDEVELD]: And again the linguistics separation was
5 designed to prevent inmates from conspiring, I'm sorry detainees from
6 conspiring.

7 A [MAJ ORLICH]: Yes.

8 Q [LTC VANDEVELD]: Had riots occurred in the past?

9 A [MAJ ORLICH]: Yes.

10 Q [LTC VANDEVELD]: Had organized protests taken place before
11 May 2004?

12 A [MAJ ORLICH]: Yes.

13 TC [LTC VANDEVELD]: Thank you. I have nothing further.

14 **REDIRECT EXAMINATION**

15 **Questions by defense counsel:**

16 Q [MAJ FRAKT]: Major Orlich are you at all familiar with the
17 records of Mohammed Jawad, ISN 900?

18 A [MAJ ORLICH]: No I am not.

19 Q [MAJ FRAKT]: If his DIM, you are familiar with the DIMS,
20 correct?

21 A [MAJ ORLICH]: That's correct.

22 Q [MAJ FRAKT]: And in the DIMS disciplinary infractions are
23 recorded, correct?

1 A [MAJ ORLICH]: That's correct.

2 Q [MAJ FRAKT]: So if a detainee were violent, tried to hit a
3 guard, tried to spit, throw feces that would be in the DIMS?

4 A [MAJ ORLICH]: It should be. It should be recorded.

5 Q [MAJ FRAKT]: So if there is nothing like that, no violence
6 towards guards, no disruptive behavior, as you've described. Would
7 it surprise you that someone was subjected to the Frequent Flyer
8 Program anyway?

9 A [MAJ ORLICH]: If he was in camps two and three, he was
10 probably there for disciplinary reasons. If he was in camps two and
11 three, especially Lima block or one of the other blocks, he may have
12 been there, vetted--that may have been vetted by his interrogators to
13 be there. They also had a say in where certain detainees went in
14 accordance with their behavioral level in the camp.

15 Q [MAJ FRAKT]: Is it your testimony that moving a detainee 112
16 times, 8 times a day, in a 14 day period is humane treatment?

17 A [MAJ ORLICH]: Yes.

18 Q [MAJ FRAKT]: And is it your testimony that moving a detainee
19 112 times, 8 times a day, over a 14 day period----

20 A [MAJ ORLICH]: Did you say 100, did you say 112 times a day?

21 Q [MAJ FRAKT]: 112 times, 8 times per day, in a 14 day period,
22 would not impact the detainees ability to sleep? Do you think that
23 what impact a detainee's ability to sleep?

1 A [MAJ ORLICH]: Yes, many of the detainees who were in the
2 program slept quite frequently when they weren't being moved.

3 Q [MAJ FRAKT]: You indicated that they would be left alone
4 between the moves but isn't it true that there is prayer call
5 broadcast five times a day in the prison, in the camp?

6 A [MAJ ORLICH]: That's correct.

7 Q [MAJ FRAKT]: And three meals per day are served?

8 A [MAJ ORLICH]: That's correct.

9 Q [MAJ FRAKT]: Was there a policy of playing loud music or loud
10 noises at times to distract the detainees?

11 A [MAJ ORLICH]: Other than the call to prayer, no.

12 Q [MAJ FRAKT]: So you are saying that that never happened?

13 A [MAJ ORLICH]: Not that I recall, not in the camp, not on the
14 blocks.

15 Q [MAJ FRAKT]: So where did it happen?

16 A [MAJ ORLICH]: I can only speak for inside of the camp that
17 wasn't part of our standard operating procedure and anything that
18 went over the mic for the camp had to be authorized by the commander
19 and that was usually normally the call to pray every day. Or an
20 announcement that detainees have been moved over to camp four for
21 their cooperation and any other approved message. But I don't recall
22 music being--other than the call to prayer, I don't recall music
23 being played over the speakers in the camps.

1 Q [MAJ FRAKT]: So music was not standard operating procedures
2 but the Frequent Flyer Program was standard operating procedure?

3 A [MAJ ORLICH]: Yes.

4 Q [MAJ FRAKT]: So can you explain why the Frequent Flyer
5 Program does not appear in the standard operating procedures from
6 that time, in writing?

7 A [MAJ ORLICH]: No.

8 DC [MAJ FRAKT]: Okay, Thank you Major Orlich.

9 MJ [COL HENLEY]: Major Orlich thank you for your testimony you
10 are excused, please don't discuss your testimony with anybody except
11 for the attorneys.

12 WIT [MAJ ORLICH]: Thank you, sir.

13 MJ [COL HENLEY]: How can we turn off the, there we go. Major
14 Frakt did you have additional witnesses on the D4 motion, unlawful
15 influence.

16 DC [MAJ FRAKT]: Just potentially Colonel Morris himself who I
17 believe is engaged in US v. Khadr. We were going to try to reach him
18 over the lunch break.

19 MJ [COL HENLEY]: Okay so we can't proceed to argument on
20 supplemental argument on D4, you want to talk to Colonel Morris.

21 DC [MAJ FRAKT]: We would like to talk to him. It might not be
22 necessary if we were provided the e-mail that we had requested be
23 compelled.

1 TC [LTC VANDEVELD]: Your Honor, I am sorry I didn't get.

2 Colonel Morris actually might be upstairs and maybe observing the
3 proceedings and if so I would ask him to come down so that we can
4 continue.

5 MJ [COL HENLEY]: Do you want to call him as a witness now?

6 DC [MAJ FRAKT]: If he is here now, sure let's do it now.

7 TC [LTC VANDEVELD]: Otherwise sir we have Captain Meneley who
8 was present to testify.

9 MJ [COL HENLEY]: You wanted, Defense I understand you wanted to
10 talk to that witness over lunch.

11 DC [MAJ FRAKT]: Our preference, Your Honor, would be to talk to
12 both witnesses over lunch. I really don't want to put Colonel Morris
13 on the stand if he doesn't have any relevant testimony to offer, but
14 one thing I would like to get a ruling on if at all possible prior to
15 meeting with him, is are we entitled to these e-mails that Captain
16 McCarthy sent him regarding General Hartmann's potential testimony.

17 MJ [COL HENLEY]: Colonel Vandeveld is there an issue with
18 production of e-mail to the custodian of the document or the document
19 no longer exists.

20 TC [LTC VANDEVELD]: I don't believe so, sir.

21 MJ [COL HENLEY]: Are you in possession of the e-mail?

22 TC [LTC VANDEVELD]: That I don't know and I don't have it with
23 the physically, but if it does exist it would be accessible through.

1 MJ [COL HENLEY]: During the lunch recess either provide it or
2 be prepared at two o'clock to tell the court why it has not been
3 provided to Major Frakt.

4 TC [LTC VANDEVELD]: Yes, sir.

5 MJ [COL HENLEY]: Is there anything else we can address before
6 we recess Major Frakt.

7 DC [MAJ FRAKT]: The issue of access to the detainees, who
8 observed, apparently observed an assault on, by the guards on
9 Mohammed Jawad on the second of June. We have specifically requested
10 either that the person who conducted the investigation into that
11 incident talk to those detainees and take statements or that we be
12 given the opportunity to do so. Both requests have been denied.

13 MJ [COL HENLEY]: It's an allegation of an assault on Mr. Jawad,
14 on what day?

15 DC [MAJ FRAKT]: 2 June 2008 and in fact there has been
16 investigative report prepared its classified secret. I believe
17 because it has the names of all the guards involved, I'm not sure
18 what other reason might be classified, but there was a conclusion
19 that supported Mr. Jawad's claim that he had been at the receiving
20 end of excessive force.

21 MJ [COL HENLEY]: This evidence would be relevant to what
22 motion?

1 DC [MAJ FRAKT]: It's relevant, Your Honor, in our view to D008,
2 which the course of outrageous government conduct including torture
3 and abuse of the detainee, which continues.

4 MJ [COL HENLEY]: If I understand the defense position, the
5 detainees you want to talk to would simply confirm the investigative
6 report?

7 DC [MAJ FRAKT]: I believe Your Honor that they would expand
8 significantly upon information that the only people that were
9 interviewed were the guards themselves and Mr. Jawad. The guards
10 gave, in my view, very self-serving statements in attempt to justify
11 their actions, but this particular incident precipitated a near riot
12 in the block because the other detainees were so upset by what they
13 observed, both by the use of physical violence and by the religious
14 insensitivity of the guards and so.

15 And so JTF GTMO promised a full investigation into all
16 allegations of detainee abuse, in our view an investigation which
17 only talks to one side is not a full investigation. So either the
18 investigation should include the witnesses or are we should be given
19 the opportunity talk to the witnesses.

20 MJ [COL HENLEY]: Colonel Vandeveld what is the government's
21 position on interviewing, I guess witnesses to this assault?

22 TC [LTC VANDEVELD]: Your Honor, I would just ask, I would say
23 the commission and I don't mean this with any disrespect should not

1 get involved in every, in every allegation about a disciplinary
2 infraction, every allegation about the use of force because this
3 happens so frequently within these camps that the commission would be
4 overwhelmed and act in essence as the investigative body. And that
5 authority lies with JTF GTMO and I mean that with respect.

6 MJ [COL HENLEY]: Well treating the defense request is a request
7 to produce the witnesses. The government position is you oppose the
8 motion.

9 TC [LTC VANDEVELD]: Yes, sir.

10 MJ [COL HENLEY]: All right, I'm not going to order that the
11 government produce the witnesses to be interviewed and I'll take a
12 look at--did you attach the investigative report as a supplement to
13 your motion.

14 DC [MAJ FRAKT]: I didn't Your Honor because it was classified,
15 but we can provide that here to you in chambers if that would assist
16 you in making a ruling.

17 MJ [COL HENLEY]: Provide it to the judicial support group, I'll
18 take a look at it and if necessary we can revisit the issue. Other
19 than that what else can we address?

20 DC [MAJ FRAKT]: Does the prosecution know anything about
21 Colonel Ziroffer yet?

22 TC [LTC VANDEVELD]: Your Honor we are still waiting for
23 information about her contact.

1 DC [MAJ FRAKT]: I think that's all that we are prepared to take
2 up, right this moment your honor.

3 MJ [COL HENLEY]: Colonel Vandeveld anything?

4 TC [LTC VANDEVELD]: Nothing further sir.

5 MJ [COL HENLEY]: All right 1400, until then the commission is
6 in recess.

7 [The commission recessed at 1400, 13 August 2008.]

8 [The commission was called to order at 1406, 13 August 2008.]

9 MJ [COL HENLEY]: The commission is called to all order. All
10 parties present before the recess are again present. Defense?

11 DC [MAJ FRAKT]: Your honor there was one thing that I intend to
12 bring up, but I forgot about which is the expert fees for appointing
13 of Professor Madeline Morris as a government--government appointed
14 defense expert. Since she will be the second witness to testify, we
15 were hoping clear that issue up.

16 MJ [COL HENLEY]: Will she refuse to testify unless the
17 commission qualifies her as an expert with the appropriate funding?

18 DC [MAJ FRAKT]: I do not believe that she will refuse I believe
19 that she--we are entitled to expert assistance. I put in timely
20 requests. She is eminently qualified and if the court, commission
21 considers her testimony to be relevant and admissible there would be
22 no basis to deny her compensation for the significant time and

1 trouble that she has already gone to. But--she is already here I
2 don't think that she will refuse, no.

3 MJ [COL HENLEY]: Call your next witness.

4 DC [LCDR DOXAKIS]: Your Honor, the defense calls Dr. Meneley.
5 We will send our paralegal to get him; he may be up in the DV lounge.

6 MJ [COL HENLEY]: This witness is relevant to D8?

7 DC [LCDR DOXAKIS]: Yes Your Honor.

8

9 **DOCTOR BRUCE MENELEY, Navy Captain O6, was called as a witness for**
10 **the defense, sworn, and testified as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by the defense counsel:**

13 Q [LCDR DOXAKIS]: Good afternoon doctor.

14 A [DR. MENELEY]: Good afternoon.

15 Q [LCDR DOXAKIS]: Now you previously submitted a--well first of
16 all can you please state name for the record and spell your last
17 name.

18 A [DR. MENELEY]: Bruce Meneley spelled M-E-N-E-L-E-Y.

19 Q [LCDR DOXAKIS]: Thank you. You've previously submitted a
20 declaration dated 13 June 2008 regarding Mr. Jawad is that correct?

21 A [DR. MENELEY]: That is correct.

1 Q [LCDR DOXAKIS]: And in that declaration you stated all of
2 your prior experience and training as a medical doctor, is that
3 correct?

4 A [DR. MENELEY]: That is correct.

5 Q [LCDR DOXAKIS]: And what is your current position?

6 A [DR. MENELEY]: I am the Commander of the Joint Medical Group,
7 Joint Task Force Guantánamo.

8 Q [LCDR DOXAKIS]: And when did you first take over that job?

9 A [DR. MENELEY]: 6 July 2007.

10 Q [LCDR DOXAKIS]: Now focusing on your declaration dated 13
11 June, you didn't personally examine Mr. Jawad before making this
12 declaration, correct?

13 A [DR. MENELEY]: No I did not.

14 Q [LCDR DOXAKIS]: And can you just explain how it came to be
15 that you put together this declaration?

16 A [DR. MENELEY]: It was based on a request from the Staff Judge
17 Advocates Office at the JTF Guantánamo which was based on a
18 prosecution request for information to my understanding which was
19 based on a defense request.

20 Q [LCDR DOXAKIS]: And so you were given basically a list of
21 questions to answer from the prosecution through the SJA's office?

22 A [DR. MENELEY]: Yes, ma'am.

1 Q [LCDR DOXAKIS]: And did you get assistance in answering those
2 questions and researching this issue?

3 A [DR. MENELEY]: Yes, I did.

4 Q [LCDR DOXAKIS]: And who provided assistance to you?

5 A [DR. MENELEY]: Our Behavioral Health Staff, specifically the
6 JTF psychiatrist.

7 Q [LCDR DOXAKIS]: And did you also have a medical doctor who
8 provided assistance to you?

9 A [DR. MENELEY]: He does review records for specific questions
10 on my further review of the records I believe in this case only the
11 psychiatrist was helping in that review.

12 Q [LCDR DOXAKIS]: Okay did you actually look through Mr.
13 Jawad's records in preparing this declaration?

14 A [DR. MENELEY]: I have also looked at it, yes ma'am. The
15 majority of the work, in review in the flagging specific pages was
16 done by the psychiatrist.

17 Q [LCDR DOXAKIS]: And so you review those pages that were
18 flagged and identified as being relevant by the psychologist?

19 A [DR. MENELEY]: Yes, ma'am.

20 Q [LCDR DOXAKIS]: And then did a psychologist also prepare this
21 draft for your signature?

22 A [DR. MENELEY]: The draft prepared for the signature is a work
23 product, the psychiatrist to myself which we submit to the Staff

1 Judge Advocate's Office for final draft which I reviewed and if that
2 appears to be accurate then that is what I signed.

3 Q [LCDR DOXAKIS]: Did you discuss the records that you reviewed
4 with any of the providers who actually saw Mr. Jawad in 2004 time
5 period?

6 A [DR. MENELEY]: No I did not.

7 Q [LCDR DOXAKIS]: When you were reviewing those records were
8 you aware of Mr. Jawad's age at in 2004?

9 A [DR. MENELEY]: No I was not.

10 Q [LCDR DOXAKIS]: And because the request was fairly focused
11 and asked specific questions, you focused your investigation on those
12 specific records relevant to the request, correct?

13 A [DR. MENELEY]: That would be correct.

14 Q [LCDR DOXAKIS]: So at the time that you made this declaration
15 were you aware that Mr. Jawad had been interviewed by the BSCT
16 psychologist or had been the subject of BSCT recommendation?

17 A [DR. MENELEY]: No I was not aware of that.

18 Q [LCDR DOXAKIS]: And can you just described for the court what
19 is--what is BSCT stand for?

20 A [DR. MENELEY]: BSCT stands for Behavioral Health Science
21 Team.

22 Q [LCDR DOXAKIS]: And is that part of this people that you
23 supervise in your role?

1 A [DR. MENELEY]: No it's not.

2 Q [LCDR DOXAKIS]: It's a separate program from the medical
3 providers?

4 A [DR. MENELEY]: Completely separate.

5 Q [LCDR DOXAKIS]: And so you were not aware that there had been
6 this BSCT report prepared?

7 A [DR. MENELEY]: No, I was not.

8 Q [LCDR DOXAKIS]: And today you had an opportunity to review
9 that report?

10 A [DR. MENELEY]: I did.

11 Q [LCDR DOXAKIS]: And in your opinion did you find the report
12 to be troubling?

13 A [DR. MENELEY]: Yes, I did.

14 Q [LCDR DOXAKIS]: And is it your opinion that if an
15 interrogator has concerns about a detainee's mental health that they
16 should contact a mental health provider and not a BSCT?

17 A [DR. MENELEY]: Yes, that would be correct.

18 Q [LCDR DOXAKIS]: You also--in preparing your declaration you
19 didn't review, focus on review of the medical records from the time
20 period after May 20 of 2004, is that accurate?

21 A [DR. MENELEY]: May I refer to my notes for just one moment,
22 may I?

1 Q [LCDR DOXAKIS]: Yes, would it help to look at your
2 declaration?

3 A [DR. MENELEY]: That's what I was going to look at.

4 Q [LCDR DOXAKIS]: You have a copy of the declaration?

5 A [DR. MENELEY]: Yes, ma'am.

6 Q [LCDR DOXAKIS]: Okay.

7 A [DR. MENELEY]: And can you repeat your question please.

8 Q [LCDR DOXAKIS]: What my question was that in preparing this
9 declaration you do not focus on the records from after May of 2004
10 and specifically the paragraph that I am looking at is number eight
11 and nine.

12 A [DR. MENELEY]: I believe that our review what at least
13 through 2 June 2004 as noted in paragraph 13.

14 Q [LCDR DOXAKIS]: So as far as you can recollect it went from
15 through the period of 2003 and into June of 2004?

16 A [DR. MENELEY]: Yes, ma'am.

17 Q [LCDR DOXAKIS]: To 2 June specifically?

18 A [DR. MENELEY]: Yes, ma'am.

19 Q [LCDR DOXAKIS]: When I was talking to your earlier today I
20 showed you a number of medical entries in Mr. Jawad's record from
21 late May, June and early July correct?

22 A [DR. MENELEY]: Yes, ma'am.

1 Q [LCDR DOXAKIS]: And in your review of those records was their
2 some indication of Mr. Jawad making somatic complaints during that
3 time period?

4 A [DR. MENELEY]: Yes, there were some complaints.

5 Q [LCDR DOXAKIS]: And can you just describe for us what a
6 somatic complaint is?

7 A [DR. MENELEY]: It's a physical ailment or complaint it could
8 be a toothache, a stomach ache, a stuffy nose things of that nature.

9 Q [LCDR DOXAKIS]: And those records that you looked at from the
10 time period did you also notice that there were some problems with
11 sleep and he was actually given a prescription during that time
12 period?

13 A [DR. MENELEY]: Yes, ma'am that would be correct.

14 Q [LCDR DOXAKIS]: And also during that time period did you
15 notice the diagnosis of adjustment disorder on some of those records?

16 A [DR. MENELEY]: There was that diagnoses I believe, yes.

17 Q [LCDR DOXAKIS]: And did some of those records also indicate
18 that Mr. Jawad was refusing to talk or make eye contact with various
19 medical providers?

20 A [DR. MENELEY]: That was documented yes.

21 Q [LCDR DOXAKIS]: And we also discussed and you reviewed that
22 he was showing a medical providers adjust--viewed him to be showing
23 some change in affect can you just----

1 A [DR. MENELEY]: Yes, ma'am. There were comments about his
2 affect.

3 Q [LCDR DOXAKIS]: I'm trying to find the specific term that we
4 discussed, the restricted affect was noted.

5 A [DR. MENELEY]: Yes, ma'am.

6 Q [LCDR DOXAKIS]: What does that mean to you?

7 A [DR. MENELEY]: There is not a wide range of emotions
8 expressed.

9 Q [LCDR DOXAKIS]: Prior to making the statements in your
10 declaration, did you review any of the DIMS records regarding Mr.
11 Jawad from this period in Guantánamo?

12 A [DR. MENELEY]: No, I did not.

13 Q [LCDR DOXAKIS]: Are you aware of medical providers or
14 psychological providers being part of a vetting process for detainees
15 before they participate in the frequent flyer program?

16 A [DR. MENELEY]: I am not aware of that personally.

17 Q [LCDR DOXAKIS]: Do you believe in your opinion that it would
18 be appropriate to have a medical provider participate in that vetting
19 process?

20 A [DR. MENELEY]: I would say that in the role of a medical
21 provider for a detainee, any role outside of providing medical care
22 would probably be inappropriate.

1 Q [LCDR DOXAKIS]: Are you aware of the American Medical
2 Association and American Psychiatric Association prohibition against
3 physician involvement and psychological involvement in
4 interrogations?

5 A [DR. MENELEY]: I am.

6 Q [LCDR DOXAKIS]: And what is that position?

7 A [DR. MENELEY]: I have not read that specifically so I can't
8 tell you specifically but in general response to your question they
9 prohibit the participation of psychiatrists in the behavioral health
10 games associated with interrogations.

11 Q [LCDR DOXAKIS]: Now in your declaration you make reference to
12 a self harm incident in regard to Mr. Jawad on 25 December 2003,
13 correct?

14 A [DR. MENELEY]: Yes, ma'am.

15 Q [LCDR DOXAKIS]: And were you also aware of the DIMS record
16 that recorded that same incident as an attempted hanging, when you
17 made your declaration?

18 A [DR. MENELEY]: I know that there was reference to a hanging,
19 I don't know if it came from a DIMS report or some other source.

20 Q [LCDR DOXAKIS]: Are you aware of any investigation, did you
21 participate in any investigation as to what happened with that
22 incident and if it was a hanging or a self harm incident?

1 A [DR. MENELEY]: I was personally not involved in any
2 investigation no.

3 Q [LCDR DOXAKIS]: And your statement in your declaration was
4 just based on your review of the medical records then?

5 A [DR. MENELEY]: Yes, ma'am.

6 Q [LCDR DOXAKIS]: Now was there a point when you were involved
7 in a meeting with Brigadier General Hartmann, Brigadier General
8 Zanetti and other people discussing the release of medical records?

9 A [DR. MENELEY]: Yes, ma'am.

10 Q [LCDR DOXAKIS]: And do you remember what happened during that
11 meeting?

12 A [DR. MENELEY]: Yes, ma'am.

13 Q [LCDR DOXAKIS]: Can you just----

14 TC [LTC VANDEVELD]: Your Honor, I'm sorry to interrupt this is
15 beyond the scope of the Motion D008, that the defense represented
16 this witness would testify about it?

17 MJ [COL HENLEY]: Is this now relevant to D4.

18 DC [LCDR DOXAKIS]: This particular question, yes Your Honor,
19 since it just became relevant this morning to our knowledge and I'm
20 just going to ask one or two questions about this than.

21 MJ [COL HENLEY]: Okay I will allow it.

22 Q [LCDR DOXAKIS]: Can you just briefly describe what, why you
23 remember that meeting?

1 A [DR. MENELEY]: It was significant because we were having
2 discussions on the appropriate release of detainee medical records
3 and General Hartmann specifically requested a meeting with myself to
4 discuss the situation.

5 Q [LCDR DOXAKIS]: And did to object to the release of records?

6 A [DR. MENELEY]: No, ma'am.

7 Q [LCDR DOXAKIS]: Okay. What was your position regarding the
8 release of those records?

9 A [DR. MENELEY]: The policy and process in the manner for
10 release was in question and it was my belief from higher authority
11 that there should be some form of process. It was General Hartmann's
12 opinion that the only process was to directly hand the records over
13 to the prosecution and so we disagreed on that point.

14 Q [LCDR DOXAKIS]: Was Brigadier General Hartmann respectful to
15 you in the way he objected to your position?

16 A [DR. MENELEY]: I would characterize his approach as blunt and
17 forceful. I don't feel he was being personally disrespectful of my
18 position.

19 Q [LCDR DOXAKIS]: In your several years of experience and your
20 medical opinion your professional experience did you feel that it was
21 an appropriate response to your position?

22 A [DR. MENELEY]: I thought it was unusual that he was
23 advocating something where I had said I wanted to get a higher

1 authority review and receive formal guidance on the release process.
2 I thought it was unusual that he would or that he would be able to
3 determine the process himself. And I just thought it was unusual.

4 DC [LCDR DOXAKIS]: Nothing further.

5 MJ [LTC VANDEVELD]: Cross Examination.

6 TC [LTC VANDEVELD]: Yes, thank you, Your Honor.

7 **CROSS EXAMINATION**

8 **Questions by the trial counsel:**

9 Q [LTC VANDEVELD]: Doctor at this point had you reviewed all of
10 Mr. Jawad's medical records?

11 A [DR. MENELEY]: Can I clarify all?

12 Q [LTC VANDEVELD]: Well the ones that have been generated so
13 far?

14 A [DR. MENELEY]: Is the question have I looked at every page of
15 his medical record?

16 Q [LTC VANDEVELD]: No, but have you examined the points that
17 you or others found to be important?

18 A [DR. MENELEY]: I have examined the pages that were, where
19 questions were asked and we were asked for a response.

20 Q [LTC VANDEVELD]: Just so I'm clear and everyone else is
21 clear. This is the first time you and I have met?

22 A [DR. MENELEY]: That's correct.

23 Q [LTC VANDEVELD]: You and I have never spoken before?

1 A [DR. MENELEY]: No we have not.

2 Q [LTC VANDEVELD]: I certainly haven't been giving you any
3 directions to how your declaration should be prepared?

4 A [DR. MENELEY]: I have not seen that from you personally, no.

5 Q [LTC VANDEVELD]: Now you've obviously looked over your
6 declaration today. There is nothing you would change about it is
7 there?

8 A [DR. MENELEY]: No, there is not.

9 Q [LTC VANDEVELD]: And you stand by medical conclusion that
10 you've reached within this declaration?

11 A [DR. MENELEY]: I do.

12 Q [LTC VANDEVELD]: In the records that you have reviewed
13 regarding the detainee, Mr. Jawad, you found no evidence that he had
14 been tortured at anytime in the past had you?

15 A [DR. MENELEY]: There is no evidence of that.

16 Q [LTC VANDEVELD]: What about evidence of coercive techniques
17 used to question him?

18 A [DR. MENELEY]: The medical records do not reveal that.

19 Q [LTC VANDEVELD]: And you say at one point he was prescribed a
20 sleeping medication, sleep medication?

21 A [DR. MENELEY]: Yes, sir.

22 Q [LTC VANDEVELD]: And you can refer to notes if you wish, when
23 was that?

1 A [DR. MENELEY]: That was in a timeframe of 2 June 2004.

2 Q [LTC VANDEVELD]: Did you accept for the moment that Mr. Jawad
3 was in the so-called frequent flyer program from 7 May 2004 through
4 20 May 2004. Would you expect him to express to a medical provider
5 or to a psychiatric technician some complaint about sleep disturbance
6 during that timeframe?

7 A [DR. MENELEY]: I would think so, yes.

8 Q [LTC VANDEVELD]: Is it logical doctor for Mr. Jawad to
9 complain 12 or 13 days after his participation in the program ended--
10 --

11 DC [LCDR DOXAKIS]: Object.

12 Q [LTC VANDEVELD]: ----that he was, may I finish the question
13 please.

14 DC [LCDR DOXAKIS]: Objection, Your Honor.

15 Q [LTC VANDEVELD]: That he was suffering from sleep problems?

16 MJ [LTC VANDEVELD]: Basis.

17 DC [LCDR DOXAKIS]: This really calls for speculation on the
18 part of the doctor, he can talk about what he has reviewed in the
19 records, but he wasn't there to examine Mr. Jawad.

20 MJ [LTC VANDEVELD]: Overruled.

21 Q [LTC VANDEVELD]: So would you like me to restate the
22 question?

23 A [DR. MENELEY]: If you could please?

1 Q [LTC VANDEVELD]: If you accept that Mr. Jawad was in the
2 Frequent Flyer Program, which required him to be moved eight times a
3 day for a period of 13 or 14 days, from cell to cell, during which
4 period he was permitted to sleep. Would you expect him to complain
5 about sleep problems, 12 or 13 days after his participation in the
6 program ended?

7 A [DR. MENELEY]: The potential exists.

8 Q [LTC VANDEVELD]: Is it likely, is it probable?

9 DC [LCDR DOXAKIS]: Objection, Your Honor.

10 MJ [LTC VANDEVELD]: Sustained.

11 Q [LTC VANDEVELD]: Now you looked at Mr. Jawad's medical
12 records for 20 May 2004, is that correct?

13 A [DR. MENELEY]: Yes, sir.

14 Q [LTC VANDEVELD]: And he was seen by what we call the Psych
15 Tech, what is a Psych Tech?

16 A [DR. MENELEY]: A psychiatric Tech is an enlisted member in
17 the military that has had some specific training for psychological
18 evaluation of patients that they are directed to evaluate.

19 Q [LTC VANDEVELD]: Are you aware of any detail what the
20 training consisted of?

21 A [DR. MENELEY]: I cannot tell you with detail what their
22 current curriculum is.

23 Q [LTC VANDEVELD]: Have you worked with them before though?

1 A [DR. MENELEY]: Yes, I have.

2 Q [LTC VANDEVELD]: Do you consider them to be competent in what
3 they are asked to do?

4 A [DR. MENELEY]: Yes, I do.

5 Q [LTC VANDEVELD]: Have you had occasion to see them interact
6 with patients?

7 A [DR. MENELEY]: I have.

8 Q [LTC VANDEVELD]: And have you noticed that there has been any
9 disconnect when they try to interact with patients?

10 A [DR. MENELEY]: No I have not.

11 Q [LTC VANDEVELD]: And so a psychiatric technician who examined
12 Mr. Jawad on 20 May and noted that he had no psych complaints, no
13 suicidal or homicidal ideation and that was entered into the medical
14 record. Would you find that to be reliable?

15 A [DR. MENELEY]: Yes, I would.

16 Q [LTC VANDEVELD]: Now the medical records that you reviewed,
17 did they list the names of the psychiatric technicians on the records
18 themselves?

19 A [DR. MENELEY]: They will sometimes have a true name, they do,
20 not consistently.

21 Q [LTC VANDEVELD]: And sometimes they are redacted, and in the
22 words the name is removed to protect their identity?

1 A [DR. MENELEY]: In the records we provide there are all
2 redacted, yes.

3 Q [LTC VANDEVELD]: Now during the time frame you weren't there
4 in 2004--I want to ask you about the so-called suicide attempt. How
5 were you able to evaluate that? I'm talking about the one that
6 occurred on 25 allegedly occurred on 25 December 2003.

7 A [DR. MENELEY]: Yes, sir. The incident on that date was
8 witnessed by a psychiatric technician. There is a note in the record
9 from the Behavior Health Staff noting the sequence of events and it
10 was categorized as self injurious behavior not as a suicide attempt.

11 Q [LTC VANDEVELD]: Tell us the difference please?

12 A [DR. MENELEY]: Self injurious behavior is conduct by someone
13 where they will intentionally will hurt themselves to--for multiple
14 reasons to gain attention and try to gain something that they want.
15 Their intent is not to kill themselves.

16 Q [LTC VANDEVELD]: Were you able to tell what Mr. Jawad's
17 intent was by this so-called self injurious behavior on the 25
18 December 2003?

19 A [DR. MENELEY]: From the notes of the medical staff wrote,
20 they indicated that he was upset at removal of some of his comfort
21 items and that was his response, assuming that he wanted his comfort
22 items back.

1 Q [LTC VANDEVELD]: So was it more not a cry for help but a cry
2 for his comfort items is that accurate?

3 A [DR. MENELEY]: That is what the medical notes would seem to
4 indicate.

5 Q [LTC VANDEVELD]: And you have no reason to doubt the validity
6 of those notes?

7 A [DR. MENELEY]: No, sir.

8 Q [LTC VANDEVELD]: You mentioned that you had taken a look at
9 the so-called BCST evaluation of this case over the lunch period?

10 A [DR. MENELEY]: Yes, sir.

11 Q [LTC VANDEVELD]: Is that the first time that you had seen it?

12 A [DR. MENELEY]: Yes, sir.

13 Q [LTC VANDEVELD]: And I think you had said you were troubled
14 by it?

15 A [DR. MENELEY]: I was.

16 Q [LTC VANDEVELD]: Do you yourself have any psychiatric or
17 psychological training as it's applied to interrogation techniques?

18 A [DR. MENELEY]: No, sir.

19 Q [LTC VANDEVELD]: Have you read any literature that might lead
20 you to have some basis to find that troubling?

21 A [DR. MENELEY]: Not specifically to BSCT, no, sir.

1 Q [LTC VANDEVELD]: So you found it troubling because you are a
2 medical provider and that wouldn't be the way you would operate
3 personally?

4 A [DR. MENELEY]: That would be correct, yes, sir.

5 Q [LTC VANDEVELD]: And you are not here to express an opinion
6 as to the trained psychologist participations in the so-called BCST
7 process?

8 A [DR. MENELEY]: I wouldn't be qualified to make that judgment.

9 TC [LTC VANDEVELD]: No further questions, thank you. I am
10 sorry that you were kept waiting today.

11 MJ [COL HENLEY]: Redirect?

12 **REDIRECT EXAMINATION**

13 **Questions by the defense counsel:**

14 Q [LCDR DOXAKIS]: Dr. Meneley we discussed that Mr. Jawad had a
15 weight loss during the month of May 2004 of approximately 13 pounds,
16 correct?

17 A [DR. MENELEY]: Yes, ma'am.

18 Q [LCDR DOXAKIS]: And you saw the documents that documented
19 that weight loss?

20 A [DR. MENELEY]: Yes, ma'am.

21 Q [LCDR DOXAKIS]: There was nothing in his records indicate
22 that he was on a hunger strike or anything like that during that
23 month is there?

1 A [DR. MENELEY]: Not that I saw, no.

2 Q [LCDR DOXAKIS]: Would a weight loss of 13 pounds over the
3 course of one-month cause some medical concern in your mind?

4 A [DR. MENELEY]: It would certainly cause us to watch over him
5 more closely.

6 Q [LCDR DOXAKIS]: And what are some of the impacts that people
7 might suffer from a significant weight loss in one-month that you
8 might routinely see?

9 A [DR. MENELEY]: For that level of weight-loss there is
10 probably nothing specific that we might see. Our concern would be
11 more for a continued trend.

12 Q [LCDR DOXAKIS]: And over your course of working with the
13 detainees have you noticed at all that some of them don't trust the
14 medical providers or the psychological providers?

15 A [DR. MENELEY]: Yes, ma'am, we do see that.

16 Q [LCDR DOXAKIS]: And were you aware of Mr. Jawad's statements
17 that he doesn't trust medical providers?

18 A [DR. MENELEY]: I am not aware of those, no.

19 Q [LCDR DOXAKIS]: If someone doesn't trust a medical provider
20 in your opinion what impact does that have on the treatment that can
21 be provided or the information that is gathered?

22 A [DR. MENELEY]: It certainly makes our job very challenging.

1 Q [LCDR DOXAKIS]: Does it result in possibly not obtaining all
2 the relevant information?

3 A [DR. MENELEY]: There is that potential.

4 Q [LCDR DOXAKIS]: In the records that you reviewed, Mr.
5 Jawad's, some of them indicate that an interpreter was present and
6 some don't have that indication, correct?

7 A [DR. MENELEY]: I believe that is correct, yes.

8 Q [LCDR DOXAKIS]: And you don't have any way of knowing for
9 sure whether or not there was an interpreter there if it's not
10 indicated, is that accurate to say?

11 A [DR. MENELEY]: That would be an accurate statement, yes.

12 Q [LCDR DOXAKIS]: And you also don't have any knowledge of Mr.
13 Jawad's English language abilities, do you?

14 A [DR. MENELEY]: Not directly, no ma'am.

15 Q [LCDR DOXAKIS]: The only knowledge you have is what others
16 would put down in their notes, correct?

17 A [DR. MENELEY]: That's correct.

18 Q [LCDR DOXAKIS]: The weight-loss that we described the 13
19 pounds was approximately 10% of Mr. Jawad's body weight. Would a
20 weight-loss like that be something you would call medically
21 significant?

22 A [DR. MENELEY]: I'm not entirely sure, it would be a
23 significant weight loss whether it had medical significance would be

1 determined by other studies, but in and of itself that's a fair
2 weight loss during that timeframe.

3 Q [LCDR DOXAKIS]: Would you say that that's a potentially
4 unhealthy weight loss to lose that much weight and one-month?

5 A [DR. MENELEY]: Not necessarily unhealthy, but certainly
6 something that you would want to watch.

7 Q [LCDR DOXAKIS]: Would such a loss be unusual for someone who
8 is confined to a cell for 23 hours a day?

9 A [DR. MENELEY]: Not necessarily.

10 Q [LCDR DOXAKIS]: A person who is eating normally, if they are
11 not in a hunger strike then would you think that such a loss would be
12 a little bit unusual?

13 A [DR. MENELEY]: Yes.

14 Q [LCDR DOXAKIS]: Regarding the incident in your declaration of
15 self harm or the--as reported in DIMS as an attempted suicide. You
16 don't know for a fact that it wasn't an attempted suicide correct?

17 A [DR. MENELEY]: I don't have personal knowledge of the event,
18 but I have what I read in the medical record.

19 Q [LCDR DOXAKIS]: So you don't know for a fact what actually
20 happened at that time?

21 A [DR. MENELEY]: Again I cannot personally attest to it. I can
22 only attest to what's documented in the record.

1 Q [LCDR DOXAKIS]: Do you have any knowledge of any of the
2 Psyche Techs in 2004 spoke Pashto?

3 A [DR. MENELEY]: I don't have that information.

4 DC [LCDR DOXAKIS]: I have nothing further.

5 MJ [COL HENLEY]: Doctor thank you very much for your testimony.
6 You are excused; I need to advise you please don't discuss your
7 testimony with anybody except for the attorneys. Thank you.

8 WIT [DR. MENELEY]: Yes, Your Honor.

9 MJ [COL HENLEY]: Your next witness Major Frakt.

10 DC [MAJ FRAKT]: The defense would call Professor Madeline
11 Morris, but we don't know if she is in the building yet. Last we
12 heard they were going to obtain her, can I send my paralegal to in
13 search of?

14 MJ [COL HENLEY]: Yes.

15 DC [MAJ FRAKT]: Okay. Thank you, Your Honor. Professor Morris
16 has prepared some PowerPoint slides that she was hoping to use to
17 illustrate her testimony and we have them loaded on this computer.
18 I'm not sure how they get projected. Your Honor the witness had
19 indicated she had a couple questions for me before she goes on the
20 stand. May we take a brief recess in place while my paralegal sets
21 up the slides?

22 MJ [COL HENLEY]: How long do you think her testimony will take?

1 DC [MAJ FRAKT]: Well I suppose that depends on how much you
2 allow, but at least an hour.

3 MJ [COL HENLEY]: Do you anticipate a lengthy cross-examination?

4 TC [LTC STEVENSON]: No, Your Honor but I would state this
5 point. I mean, the court has already seen a lot of evidence, Dr.
6 Morris's bottom line. I mean I don't know it if defense is just
7 going to have her re-summarize what the court has already seen. I
8 can't imagine how this can take an hour at this point.

9 DC [MAJ FRAKT]: Your Honor, everything we are going to talk to
10 her about is new supplemental information not previously provided in
11 defense filings or expanding.

12 But in large measure we wanted her to be available to you
13 as an expert on the law of war and on international law to answer any
14 questions that you might have about jurisdiction because under MCRE
15 201(b), the commission is allowed to seek expert assistance on the
16 law of war and on international law. And she is really one of the
17 foremost experts in the world in this area so. I would certainly
18 welcome guidance from the commission on the areas that the commission
19 is particularly interested in, if any as we proceed. But my
20 intention is not to rehash things that have already been previously
21 provided.

22 MJ [COL HENLEY]: Professor Morris is not my expert. The
23 commission is not asked that she be provided, she is your witness so

1 you can examine her as you see fit. I may or may not follow up with
2 her.

3 DC [MAJ FRAKT]: Yes, sir.

4 MJ [COL HENLEY]: I may pursuant to the appropriate rules
5 designate my own expert at some point in the future, but at this
6 point Professor Morris is not the commission's expert. So I do have
7 your filings.

8 DC [MAJ FRAKT]: Yes, Your Honor, to the extent that you might
9 have any questions about any of those filings she is certainly
10 prepared to address those.

11 MJ [COL HENLEY]: Okay, my question went more to logistics. When
12 you say you need a couple minutes is the best that we take a recess
13 to allow the parties to use the facilities and then return or just
14 literally break in place?

15 DC [MAJ FRAKT]: If the court is going to indulge a short recess
16 then we will ask for that, yes Your Honor.

17 MJ [COL HENLEY]: Okay. Is Professor Morris the last witness
18 for the day?

19 DC [MAJ FRAKT]: Most likely unless we are able to get Colonel
20 Zierhoffer on the phone. Do we have an update on that?

21 TC [LTC VANDEVELD]: We are going to check on that, we have a
22 telephone number for her, sir.

1 MJ [COL HENLEY]: Okay, why don't we do this, counsel let's go
2 ahead and take 30 minutes. You accomplish what you need with the
3 professor, we'll come back, hear her testimony and see where we are
4 with Colonel Zierhoffer and then I will hear argument on any motions
5 that we can address this afternoon. Okay. So 30 minutes. The
6 commission is in recess.

7 [The military commission recessed at 1443, 13 August 2008.]

8 [The military commission was called to order 1519, 13 August 2008.]

9 MJ [COL HENLEY]: The commission is called to order all parties
10 present before the recess are again present. Call your next witness
11 please.

12 DC [MAJ FRAKT]: The defense calls Professor Madeline Morris.
13 **PROFESSOR MADELINE MORRIS, Civilian, was called as a witness for the**
14 **defense, sworn, and testified as follows:**

15 **DIRECT EXAMINATION**

16 **Questions by defense counsel:**

17 Q [MAJ FRAKT]: Good afternoon Professor Morris. I understand
18 you have had a bit of an adventure getting down here?

19 A [PROF MORRIS]: Quite an adventure.

20 Q [MAJ FRAKT]: The court has already been provided with a copy
21 of your CV attached to an earlier motion. Does the commission desire
22 that I go through the full qualifications of this witness?

23 MJ [COL HENLEY]: It's not necessary.

1 Q [MAJ FRAKT]: Thank you. But I would like to focus on a few
2 particular relevant items of your background, Professor Morris. Now
3 you're currently a Professor of Law at Duke Law School?

4 A [PROF MORRIS]: That's right.

5 Q [MAJ FRAKT]: And what are your teaching areas?

6 A [PROF MORRIS]: International law, law of war,
7 counterterrorism law, international criminal law.

8 Q [MAJ FRAKT]: And in addition to your teaching have you served
9 as a legal adviser to war crimes tribunals around the world?

10 A [PROF MORRIS]: I have to the Special Court for Sierra Leone,
11 where I was Senior Legal Counsel to the prosecutor and advising
12 governments in Rwanda, Ethiopia, Serbia on their war crimes
13 prosecutions.

14 Q [MAJ FRAKT]: May I approach the witness? [Defense counsel
15 adjusted witness mic.] So you advised the Sierra Leone court.

16 A [PROF MORRIS]: Office of the Prosecutor, yes.

17 Q [MAJ FRAKT]: And you also--is it also true that you have been
18 an advisor or chief counsel to the defense counsel for the Office of
19 Military Commissions?

20 A [PROF MORRIS]: I was from '07 to '08 February.

21 Q [MAJ FRAKT]: And you were hired for that position because of
22 your expertise in international law and the law of war?

23 A [PROF MORRIS]: That's correct.

1 Q [MAJ FRAKT]: And you are not currently serving in that
2 position?

3 A [PROF MORRIS]: No I am not.

4 Q [MAJ FRAKT]: You have any vested interest in the outcome of
5 this case?

6 A [PROF MORRIS]: Not at all.

7 Q [MAJ FRAKT]: And you are so far not being paid for being here
8 are you?

9 A [PROF MORRIS]: I have not been paid for any of my work it's
10 been pro bono with the office.

11 Q [MAJ FRAKT]: If you had the choice you would not mind being
12 paid?

13 A [PROF MORRIS]: I would not object.

14 Q [MAJ FRAKT]: All right. I will certainly take that up with
15 the military commission. Now have you also served as a legal adviser
16 to the United States Government on international law of war and war
17 not just to the defense but the US Government on international law of
18 war or war crimes issues?

19 A [PROF MORRIS]: Yes, I served on the Secretary of State's
20 Advisory Committee on International Law, where I presented material
21 on war crimes commissions and counterterrorism law. I also served as
22 an adviser to the Office of War Crimes for the State Department and
23 the Undersecretary for Disarmament in International Security to

1 Department of Defense on the Jurisdiction of the International
2 Criminal Court and some other capacities as well.

3 Q [MAJ FRAKT]: And you have been an adviser to the legal
4 adviser to the Secretary of the Army as I understand?

5 A [PROF MORRIS]: That's correct.

6 Q [MAJ FRAKT]: And you also have advised foreign governments?

7 A [PROF MORRIS]: I have. I served as an adviser to the
8 President of Rwanda after the genocide there. The speaker of the
9 Ethiopian Parliament, the Prosecutor at the Special Court for War
10 Crimes in Serbia and conducted a liaison between the Rwanda
11 Government and the South African government on war crimes
12 prosecutions.

13 Q [MAJ FRAKT]: And have you published in this area, do you
14 write about jurisdiction of war crimes tribunals?

15 A [PROF MORRIS]: I have. Last count about a hundred articles
16 and law reviews on that issue.

17 Q [MAJ FRAKT]: That's a lot. Now, well let's just cut to the
18 chase here. Does this military commission have jurisdiction,
19 personal jurisdiction, or subject matter jurisdiction over Mohammed
20 Jawad?

21 A [PROF MORRIS]: It does not have either.

22 Q [MAJ FRAKT]: Are you familiar with the charge against Mohamed
23 Jawad?

1 A [PROF MORRIS]: I am I read the charges.

2 Q [MAJ FRAKT]: He has been charged with attempted murder in
3 violation of the law of war.

4 A [PROF MORRIS]: Yes.

5 Q [MAJ FRAKT]: And you're familiar with the basic facts that
6 have been alleged in the government filings?

7 A [PROF MORRIS]: I am.

8 Q [MAJ FRAKT]: Well let's break this down into the personal
9 jurisdiction, let's take that first and then we will move on to
10 subject matter jurisdiction. Now you have prepared some slide
11 presentation to help you to visually explain your testimony today?

12 A [PROF MORRIS]: I am hoping that it will.

13 Q [MAJ FRAKT]: The defense request the commissions permission
14 to publish or reveal the slides onto the screens?

15 MJ [COL HENLEY]: Granted.

16 Q [MAJ FRAKT]: Okay. I see the first of these slides has
17 appeared behind you, but you have a paper copy----

18 A [PROF MORRIS]: It is here as well.

19 Q [MAJ FRAKT]: ----all the slides in front of you or you have
20 it on the screen.

21 A [PROF MORRIS]: It is also on the screen.

22 Q [MAJ FRAKT]: We have a slide to flipper here, this is great.
23 Now the government in the latest answer to our, the defense

1 submission suggested that the Court of Military Commission Review in
2 the US v. Khadr has already determined this personal jurisdiction
3 issue and done so in a way that forecloses the claim that we are
4 making here in today, is that true?

5 A [PROF MORRIS]: No it is not true.

6 Q [MAJ FRAKT]: Can you walk us through why the CMCR decision,
7 US v. Khadr doesn't foreclose our position here today?

8 A [PROF MORRIS]: The CMCR in Khadr did not address the issue of
9 the jurisdictionally defective preferral of charges. It wasn't
10 before the court. It wasn't raised by the parties. It wasn't
11 briefed. It was not raised at all in oral argument. The court did
12 not ask any questions about that issue and it was not addressed in
13 the ruling in anyway.

14 The court proceeded on the reasonable premise under the
15 pleadings in that case that the charges as sworn were valid and that
16 the question arose subsequent to those charges being sworn validly.
17 So the court addressed the question what in addition to sworn charges
18 would be required for jurisdiction, but it didn't address the all of
19 the possible questions that could arise under a brand-new statute and
20 it did not address the question of defective preferral.

21 Q [MAJ FRAKT]: So you are saying that the Khadr team did not in
22 their filings did not allege defective preferral?

23 A [PROF MORRIS]: That's correct.

1 Q [MAJ FRAKT]: And the court did not address a defective
2 preferral?

3 A [PROF MORRIS]: That's correct.

4 Q [MAJ FRAKT]: All right what is the significance of this first
5 slide?

6 A [PROF MORRIS]: The CMCRC reiterated the point made in the
7 Rules for Military Commission that the military commission always has
8 jurisdiction to determine its jurisdiction, which of course is what
9 this commission is exercising now.

10 The court in doing that did not limit this commission to
11 issues that it had addressed in its Khadr opinion but rather
12 instructed that the commission should look at the issues as raised
13 before it to determine their jurisdiction under law. So that part
14 certainly in no way precludes them, rather encourages a comprehensive
15 review of issues including issues of first impression that may arise.
16 And the old ways makes perfect sense even if a ruling, say by a CSRT
17 on combatant status personally wouldn't be as to lawful or unlawful.

18 But any CSRT or competent tribunal finding would not
19 preclude a court where let's say new information became available,
20 establishing lawful combatant status surely that commission would not
21 be required nevertheless to perceive with its proceedings against
22 what would then had been established to be a lawful combatant. So

1 the court, the commission would have to have jurisdictional times to
2 establish its own jurisdiction.

3 Q [MAJ FRAKT]: And do the rules for military commission
4 specifically provide for the defense to challenge the defective
5 preferral or swearing?

6 A [PROF MORRIS]: Yes, they do. They specify that I think it's
7 905(b) specifies that they are jurisdictional as well as non-
8 jurisdictional defects possible in a preferral and that where those
9 defects are jurisdictional they would be jurisdiction and can be
10 raised at any time in the proceedings and are non-waivable.

11 Q [MAJ FRAKT]: Why can't this court, why doesn't this court
12 have personal jurisdiction over Mohammed Jawad?

13 A [PROF MORRIS]: Because there are no valid charges before this
14 court.

15 Q [MAJ FRAKT]: Now you have opined that he is, presumed to be a
16 lawful combatant where does that come from?

17 A [PROF MORRIS]: It comes from the law of war. It's one of the
18 bedrock provisions for POW rights, if an individual were not presumed
19 when they were brought into captivity to be a POW then there would be
20 no protection, no safeguards for all of the rights at all. There
21 would be no provision for there being found a POW later.

22 Q [MAJ FRAKT]: Let's move on to the next slide here. What is
23 the Charming Betsy Principle if you will?

1 A [PROF MORRIS]: The Charming Betsy Doctrine was first
2 enunciated by the Supreme Court at practically the founding of the
3 United States and has been articulated by the court repeatedly since
4 that time. What it specifies is that where a statute is amenable to
5 more than one interpretation, a court should always apply an
6 interpretation that would be consistent with international law and
7 with the US obligations under international law.

8 Q [MAJ FRAKT]: And this Charming Betsy case and this principle
9 was cited and followed by US v. Khadr?

10 A [PROF MORRIS]: Yes.

11 Q [MAJ FRAKT]: Or attempted to be followed?

12 A [PROF MORRIS]: In footnote 38, the court uses as an example
13 of customary international law, subject to the Charming Betsy
14 Doctrine and states that customary law including Article 45(2) of
15 Protocol 1, should be followed by courts in applying the military
16 commissions act and that with regard to the subjects on which that
17 court did rule. It was ruling consistently with the Charming Betsy
18 Doctrine and the underlying customary international law.

19 Q [MAJ FRAKT]: Anything else that we need to talk about in
20 Footnote 38?

21 A [PROF MORRIS]: Yes, Protocol 1 is not a treaty that the
22 United States is a party to, because the U.S. did strongly support
23 some of the provisions entailed in Protocol 1 even while it couldn't

1 become a party because of other provisions that it had objected to.
2 Because of that strong support for Articles including 45, 1 and 2,
3 the United States took the unusual step of articulating as an
4 official policy, which articles the U.S. considered to be customary
5 and endorsed and sought to convince its allies to treat as binding
6 law.

7 The Article 45, 1 and 2 established in Article 45(1), state
8 the or rather reiterate the presumption from the Geneva Conventions
9 that a person brought into custody or into captivity is a lawful
10 combatant. 45(2) gives a further right to a subsequent combatant
11 status determination if an individual is going to be prosecuted for
12 crimes arising out of the hostilities. One of the ways that we know
13 that it has to be subsequent second adjudication of status after a
14 competent tribunal determination is that as stated in the CMCR
15 opinion in Footnote 38.

16 Article 45(2) suggests that a detained individual who is
17 not being held as a POW has the right to a certain entitlement to POW
18 status before a judicial tribunal and to have judicial adjudication
19 of the status. Given 45(1) which states that an individual is
20 presumed to be a lawful combatant until a competent tribunal, an
21 Article 5 tribunal has found him to be an unlawful combatant. We
22 know that the only way that somebody could be held as it says in
23 45(2) not as a POW. And therefore have the right to an adjudication

1 of status would be if they previously had a competent tribunal
2 determination.

3 Q [MAJ FRAKT]: An article 45 is one of the ones that the U.S.
4 agreed does apply or should apply?

5 A [PROF MORRIS]: The U.S. not only specified that as a matter
6 of official U.S. policy Article 45(1) and (2) are customary
7 international law that is applicable and binding on United States.
8 But actually undertook a diplomatic campaign if you will, to convince
9 other countries to treat it in that way as well.

10 Q [MAJ FRAKT]: And when was that?

11 A [PROF MORRIS]: 1987, 10 years after the protocol was adopted
12 and put into force for other countries the United States took that
13 position.

14 Q [MAJ FRAKT]: Has the United States changed its position?

15 A [PROF MORRIS]: It had not had a prior position that was
16 different and has not subsequently had any different position on
17 that.

18 Q [MAJ FRAKT]: Now, I guess you already started to talk about
19 Article 45, paragraph 1, so is what you are saying is that Mohammed
20 Jawad should have had, should have been presumed to be a prisoner of
21 war at the time that he was captured?

1 A [PROF MORRIS]: He was legally a prisoner of war at the time
2 he was captured and remain so and will remain so unless and until he
3 has a competent tribunal determination to the contrary.

4 Q [MAJ FRAKT]: So even though the U.S. is not actually treating
5 him as a prisoner of war calling him that under international law he
6 is a prisoner of war?

7 A [PROF MORRIS]: Under international law, the law of war under
8 Article 45, which the CMCRC has said is customary law to be applied
9 under the Charming Betsy Doctrine he was at the time charges were
10 sworn a lawful combatant and he remains that.

11 Q [MAJ FRAKT]: And this part about should any doubt arise as to
12 whether any such person is entitled to POW status, where does that
13 doubt arise from is that the obligation of the detaining power to
14 raise that?

15 A [PROF MORRIS]: No, the assertion by the detained individual
16 is sufficient under international law and under U.S. law and military
17 regulation to establish doubt or rather to require them, the
18 government if it is questioning that lawful status to go through the
19 competent tribunal determination. The doubt is not a question of
20 fact beyond whether the detainee asserts POW status.

21 Q [MAJ FRAKT]: And is the CSRT that Mr. Jawad has been through
22 is that sufficient, is that adequate to meet this requirement?

1 A [PROF MORRIS]: The CMCR was very clear in the Khadr decision
2 that the CSRT because it does not distinguish between lawful and
3 unlawful combatants does not establish the jurisdictional requirement
4 of unlawful combatancy that is statutorily imposed by the MCA.

5 TC [LTC STEVENSON]: Your Honor if I may interrupt, I wanted
6 Professor Morris to finish her sentence. I've been listening and as
7 I know the court has patiently for about 15 minutes and we just
8 haven't gotten to that new stuff yet that was promised that isn't
9 already contained in submissions that have been made by the defense.
10 So if we could maybe move to that new stuff so we can just move
11 along.

12 MJ [COL HENLEY]: You can continue Major Frakt.

13 Q [MAJ FRAKT]: Thank you, Your Honor, next slide please. How
14 does Article 5 play into this?

15 A [PROF MORRIS]: Article 5 was established in the original 1949
16 POW Convention and establishes the right to a competent tribunal
17 determination of status should any doubt arise that the person is a
18 lawful combat. Because the presumption going in is that the person
19 is a lawful combatant the requirement for a competent tribunal is a--
20 establishes the sole authority within an Article 5 Competent Tribunal
21 to rebut the presumption and does not acknowledge any other method
22 for the initial rebuttal of the presumption of that status.

23 Q [MAJ FRAKT]: And this is a treaty that we signed?

1 A [PROF MORRIS]: This is a treaty that we signed. I should
2 mention also perhaps that Article 45(1), which reiterates this
3 requirement and especially 45(2) that says even after a competent
4 tribunal. There is a right to adjudication before an individual may
5 be prosecuted, was initiated by the United States after the Vietnam
6 War because of the blanket treatment of U.S. service members as
7 subject to war crimes tribunals after that war.

8 Q [MAJ FRAKT]: So there is actually a two-tier process first,
9 it has to be establish that the person is a POW or not a POW and then
10 if the detaining power wants to prosecute the person they have to do
11 it again?

12 A [PROF MORRIS]: That's correct. The person has a right to
13 assert POW status even after a competent tribunal has determined the
14 contrary that's why Article 45(2) says a person held not as a POW.
15 We know that can only be a person who has had a competent tribunal
16 determination of unlawful combatant status, then at that time the
17 person has the right to assert POW status nevertheless and to have
18 that question adjudicated by a judicial tribunal.

19 The Article 5 right also requires that an Article 5, a
20 qualified Article 5 Competent Tribunal must be composed of more than
21 one person and the reasons for that are discussed in the official
22 commentary to Article 5, which was cited by Judge Allred in his
23 December 17 ruling on competent tribunals.

1 Q [MAJ FRAKT]: And Article 5 is recognized in Army regulations
2 as being controlling law as well?

3 A [PROF MORRIS]: Army Regulations applied applicable to all
4 four services and which was promulgated specifically to implement the
5 law of war and in particular this instance to implement Article 5 of
6 the POW convention. It specifies that the presumption will be
7 respected and that it can be rebutted by only by a competent tribunal
8 determination that would overturn that presumption.

9 Q [MAJ FRAKT]: And it reiterates the three officer
10 requirements?

11 A [PROF MORRIS]: It does in Item C a competent tribunal shall
12 be composed of three commissioned officers, which is an
13 implementation of the requirements of Article 5 and again 190-8
14 specifically was developed to implement the requirements under
15 Article 5.

16 Q [MAJ FRAKT]: Now what are these older authorities here that
17 you've provided?

18 A [PROF MORRIS]: I've provided them in order to demonstrate
19 that the development in the field manual of the treatment of the
20 competent tribunal. Prior to the Geneva Conventions of 1949 we see
21 there is no specification of the number of individuals who must be,
22 of which the Article 5 tribunal must be composed and the, the

1 authorities referred to as a competent authority, higher military
2 authority, or military tribunals.

3 In order to implement the 1949 Geneva Conventions and
4 Article 5 in particular, we see that the language now is changed to a
5 competent tribunal no mention of other authority that's what has to
6 happen. And now we see again reflecting the composition requirement
7 that there must be more than one person on a competent tribunal now
8 we see for the first time that it must be not less than three
9 officers.

10 Q [MAJ FRAKT]: Now after the CMCR opinion in the Hamdan case
11 there was also some kind of a personal jurisdiction hearing. What is
12 the relevance of the that, why can't Judge Henley just hold one of
13 those hearings like Captain Allred did?

14 A [PROF MORRIS]: Captain Allred went forward with a competent
15 tribunal or Article 5 proceeding it was not in fact a qualified
16 Article 5 proceeding but he went forward with that on the basis of a
17 waiver. What he called a concession made by defense counsel during
18 the oral argument in which counsel said yes we would accept your
19 sitting as an Article 5 competent tribunal.

20 Judge Allred specifically noted the requirement in his
21 ruling of December 17 that a competent tribunal be composed of more
22 than one person. He explained the reasons for that fact that the
23 view of the drafters was that decisions, which might have the

1 greatest consequences should not be left to a single person. He
2 nevertheless said that because of the defense counsel saying "yes" we
3 would accept you as a competent tribunal he would go forward and said
4 as one nevertheless.

5 Q [MAJ FRAKT]: Do you think that the defense can waive a right
6 under the Geneva Convention like that?

7 A [PROF MORRIS]: A waiver under the Geneva Conventions is
8 invalid has no legal effect. Article 7 of the POW conventions says
9 that a POW may under no circumstances renounce in whole or in part
10 their rights under the convention.

11 Q [MAJ FRAKT]: Now the Military Commissions Act says that no
12 alien unlawful enemy combatant can invoke the protections of the
13 Geneva Convention. Is Mohamed Jawad an alien unlawful enemy
14 combatant?

15 A [PROF MORRIS]: He is not. He has not had a competent
16 tribunal determination that would suggest that he is an unlawful
17 combatant and as Judge Allred noted in his ruling. The Military
18 Commissions Act specifies that an unlawful combatant may not invoke
19 Geneva Rights but as Judge Allred said there's been no determination
20 at that time by this commission that the Hamdan commission or any
21 other tribunal as to unlawful combatant status prior to that as he
22 said there would be no bar under the MCA to the implication of Geneva
23 rights.

1 Q [MAJ FRAKT]: And did the defense in Hamdan allege a defective
2 preferral as we have done here?

3 A [PROF MORRIS]: It did not.

4 Q [MAJ FRAKT]: What is Article 102 about?

5 A [PROF MORRIS]: Article 102 specifies as the MCA then
6 implements and honors that a prisoner of war must be tried by court
7 or uses the term sentence by the same courts using the same procedure
8 as in the case of the members of the Armed Forces of the detaining
9 power here courts-martial and of course that's exactly what the MCA
10 says is required as well for anyone other than an unlawful combatant.

11 Q [MAJ FRAKT]: So that's what the next slide reflects?

12 A [PROF MORRIS]: Precisely that.

13 Q [MAJ FRAKT]: Getting back to the defense here has alleged a
14 defective swearing is there any support for that in the rules for
15 military commissions.

16 A [PROF MORRIS]: Yes the rules for military commission provide
17 that swearing of charges may be defective or that a preferral maybe
18 defective and that the defect may be jurisdictional or non-
19 jurisdictional.

20 Q [MAJ FRAKT]: And if jurisdiction attaches upon swearing what
21 does that mean?

22 A [PROF MORRIS]: Jurisdiction can't attach upon swearing if the
23 individual in question is at that time legally in the eyes of the law

1 a lawful combatant. A swearing of charges against a lawful combatant
2 would be a nullity, statutorily barred, the MCA says jurisdiction may
3 not attach against a lawful combatant rather they would be assigned
4 to a court-martial.

5 Q [MAJ FRAKT]: So the idea that just because charges have been
6 sworn means there is jurisdiction that that can't be right?

7 A [PROF MORRIS]: That can't be right, the CMCR has not
8 addressed that issue, but the MCA has and indicates that lawful
9 combatancy or unlawful combatancy would have to be established prior
10 to attachment of military commission jurisdiction. It is a statutory
11 matter. The commission jurisdiction cannot attach under the statute
12 it's not provided for under the statute in fact it's exclusively
13 excluded under the statute against an individual who is a lawful
14 combatant.

15 Q [MAJ FRAKT]: Okay I think that we have addressed this let's
16 move on. What is the significance of the slide?

17 A [PROF MORRIS]: In this quotation from the Khadr opinion, the
18 Court there has addressed the issues presented to it and based on
19 what was presented to it and what it deliberated and ruled on that
20 the CSRT decision would not provide the basis for military commission
21 jurisdiction unless it was specific as to unlawful combatant status
22 something that the CSRT's don't do at that time and still don't. But
23 that the court disagreed with Judge Brownback's conclusion that the

1 only avenue for that assessment would be a competent tribunal based
2 again on the issues that were before the court at the time.

3 The CMCR did not address the question of the defective
4 preferral or whether a competent tribunal determination or anything
5 else would be required for a defective preferral rather it said
6 premised on what we can only assume to be the case that the preferral
7 here is not in question since it was not challenged. What more would
8 be required? Once that's in place an effective swearing of charges
9 then the court went on to say what else would be required. Not
10 having considered the question of defective preferral itself.

11 Q [MAJ FRAKT]: What is this concept of prima facie personal
12 jurisdiction is that, that consistent with international law?

13 A [PROF MORRIS]: Yes, it is in fact it's required under Article
14 45(2), if we think about the fact that first an individual has to be
15 found by a competent tribunal to be an unlawful combatant and then a
16 judicial tribunal must re-establish or must adjudicate the question
17 of combatant status if POW status is asserted by the detainee then
18 that jurisdiction in the second instance would be prima facie until
19 that judicial body had determined their jurisdiction through a
20 combatant status determination.

21 Q [MAJ FRAKT]: So you think that the commission could play some
22 role in establishing lawful or unlawful combatancy they just can't be
23 the Article 5, or Article 45 tribunal is that correct?

1 A [PROF MORRIS]: That's correct. All that's required prior is
2 an Article 5 tribunal but as the rules for military commission
3 specifying and the CMCR has stated as well. The commission always
4 has jurisdiction to establish its jurisdiction and certainly would
5 continue to have that ability, to establish jurisdiction to exercise
6 in the prima facie jurisdiction put in place by the initial stamp
7 finding of unlawful combatant status. The----

8 Q [MAJ FRAKT]: I'm sorry was there something you wanted to say
9 about the previous.

10 A [PROF MORRIS]: No I'll come to it afterwards thank you.

11 Q [MAJ FRAKT]: It seems like we have seen this one before, was
12 an additional comment on this article?

13 A [PROF MORRIS]: No.

14 Q [MAJ FRAKT]: Now did Judge Allred----

15 A [PROF MORRIS]: There was a previous slide have we gone past
16 that.

17 Q [MAJ FRAKT]: ----well, give me somehow--what point did you
18 want to raise?

19 A [PROF MORRIS]: That in the most recent filing by the
20 government it notes that if there were a swearing of charges against
21 the--that the CMCR's facial compliance standard, the standard for
22 jurisdiction established in the CMCR ruling that that standard would

1 preclude the swearing or referral of charges against for example, a
2 lawful enemy combatant.

3 Absent such a misstep or other defect on the face of the
4 charges there would be jurisdiction, there would be commission
5 jurisdiction but certainly, even obviously if the charges were to be
6 sworn against a lawful enemy combatant then as the government has
7 stated those charges would not meet the CMCR standard.

8 Q [MAJ FRAKT]: Now Judge Allred did he make any mistakes
9 perhaps inadvertent errors or omissions in his opinion?

10 A [PROF MORRIS]: Judge Allred who in my opinion was quite
11 meticulous in the commission that he ran and made every effort to be
12 fair did make an oversight as to the quotation that he used. He
13 relied on one secondary source for his holding that he could collapse
14 the Article 5 and Article 45 proceedings into one proceeding that he
15 would hold.

16 Q [MAJ FRAKT]: And that authority was Howard S. Levy.

17 A [PROF MORRIS]: Yes.

18 Q [MAJ FRAKT]: And who is Howard S. Levy?

19 A [PROF MORRIS]: He is the author of the Treatise, Code of
20 International Armed Conflict that Judge Allred relied on. He was the
21 Chief of Law of War Department for the U.S. Army at one point in his
22 career and subsequently a law professor.

23 Q [MAJ FRAKT]: So he is a reasonable authority to rely on?

1 A [PROF MORRIS]: He is and clearly Judge Allred thought that he
2 was.

3 Q [MAJ FRAKT]: So what was the oversight?

4 A [PROF MORRIS]: The problem with that Judge Allred's quotation
5 represented the Levy book as in the section quoted discussing Article
6 5 of Geneva Three, the POW convention. In fact the beginning of the
7 quotation is about Article 5, but the mere ellipses and the language
8 following those ellipses in the opinion are not from the Article 5
9 section, they are from the section that is prominently noted as a new
10 subsection addressing not the 1949 conventions at all but Article 45
11 Protocol 1.

12 Q [MAJ FRAKT]: And you I believe represented that graphically
13 on one of the, perhaps the next slide or two?

14 A [PROF MORRIS]: Yes, we see that the language, which is found
15 in the comment, the present article that is Article 5 was an attempt
16 to eliminate or reduce the number of instances in which military
17 personnel in the field make an arbitrary decision that a captured
18 individual is an illegal combatant and so on that we see clearly and
19 is highlighted is sourced to Article 5, 1949, 3rd Convention.

20 Q [MAJ FRAKT]: And that was the first part of the Allred quote?

21 A [PROF MORRIS]: That is the sentence that appears before the
22 ellipses in the Allred quote.

1 Q [MAJ FRAKT]: And the next part of the quote came from this
2 next section?

3 A [PROF MORRIS]: Yes, it comes from the comment appearing under
4 the source indication Article 45(2) of Protocol 1. The language in
5 Judge Allred's ruling picks up at the second sentence here that
6 begins with, "it assures him of a further determination of that
7 question that being lawful or unlawful combatants status this time by
8 a judicial tribunal but only if the detainee power proposes to try
9 him for an offense arising out of the hostilities.

10 Q [MAJ FRAKT]: So you have one part of a quote from Article 5,
11 his comment in Article 5 and then the second part of the quote from
12 his commentary on Article 45 and they are combined so they both
13 appear to be related to Article 5.

14 A [PROF MORRIS]: Judge Allred begins or prefaces the quotation
15 by saying referring to Article 5, Howard Levy has said and then in
16 includes in the quotation materials that referred to Article 5 and
17 also those showing the source as 45(2).

18 Q [MAJ FRAKT]: Was there anything else that was unusual about
19 Judge Allred's quotation of the Levy Article?

20 A [PROF MORRIS]: Yes. The part that we see here is an accurate
21 quotation of the part about Article 5. The next part after these
22 ellipses that we have seen that is actually about Article 45(2) as we
23 have seen has language changed. It has language omitted without

1 showing ellipses and it has 12 words added as being part of the
2 quotation.

3 Q [MAJ FRAKT]: Which words were added that were not part of the
4 actual quotation?

5 A [PROF MORRIS]: Well, it assures, Judge Allred says is it
6 assures the accused of a determination by a competent tribunal. In
7 that part of the Levy quote it says it assures him of a further,
8 further determination of that question. This time by a judicial
9 tribunal that is what Howard Levy has said.

10 The Allred quote doesn't include that language at all but
11 rather says but of a further judicial tribunal and then the rest I
12 believe--but only if the detaining power proposes to try him for an
13 offense arising out of the hostilities. That part is accurate
14 apparently the highlighting here has slipped down the page. That
15 last part is accurate. The first part----

16 Q [MAJ FRAKT]: Maybe it's on the next, the next slide.

17 A [PROF MORRIS]: ----the first part as Howard Levy has
18 indicated makes it very clear that this is a further determination of
19 combatant status determination further after the competent tribunal
20 that's not made clear in the language in the December 17 ruling and
21 what also is not presented in the December 17 ruling, but which is
22 not within the quoted material, but is the sentence that follows

1 immediately afterwards is an explanation of making extremely clear
2 that there have to be two proceedings.

3 Howard Levy says it's unfortunate that the draftsmen of
4 45(2) used the phrase is not held as a prisoner of war rather than
5 using the words, stating expressly that a competent tribunal is
6 determined that he is not entitled to prisoner of war status. Of
7 course the drafters used the wording is not held as a prisoner of war
8 because they knew and apparently found it apparent that the only way
9 somebody could be held not as a prisoner of war would be if their
10 presumption of lawful combatant status, had been rebutted by a
11 competent tribunal. We have to remember that 45(2) follows
12 immediately on 45(1).

13 45(1) reiterates the presumption and the requirement that
14 only a competent tribunal may rebut the presumption, so by saying
15 here is not held as a prisoner of war. It indicates that a person
16 has already had that competent tribunal determination. This is the
17 difference between the actual quotation and the quotation as
18 presented in the December 17 ruling.

19 Q [MAJ FRAKT]: All right. Thank you. Anything you would like
20 to say about this particular slide?

21 A [PROF MORRIS]: Yes. The MCA presents the jurisdictional
22 requirements for military commission in a separate section from the
23 definitions of lawful combatants. And that's significant, the

1 jurisdiction provision makes clear that combatants would go to two
2 different jurisdictions depending on whether they were lawful or
3 unlawful. If their lawful they go to courts-martial, if they are
4 unlawful they go to military commissions.

5 The requirement therefore for a determination of whether
6 they are lawful or unlawful would have to come prior to their
7 assignment to either a military commission or a court-martial,
8 otherwise how would there be any direction on where that case should
9 be sent? So that implies of course that that determination would
10 need to be made first.

11 Also very importantly the Congress was explicit that a
12 finding of unlawful combatancy by a competent tribunal would be
13 dispositive of jurisdiction for trial by military commission for
14 trial that in which the judge can't entertain motions regarding
15 jurisdiction and make a determination of combatant status, but rather
16 would be dispositive for a trial in which pursuant to motions
17 practice that could be entertained, but then why dispositive?

18 Dispositive because elsewhere in the MCA Congress states
19 that competent tribunal determination, CSRT's or otherwise are
20 subject to appeal in the District of Columbia, Court of Appeals. So
21 the intention to move ahead with military commissions indicates that
22 regardless of any pending appeals or other challenge to a competent
23 tribunal determination. That determination will be dispositive for

1 trial by military commission at which point then the determination of
2 which court to send it to would have been made. It would go there,
3 it would not be subject to any pending appeal that trial of military
4 commission could go forward including the requirement as stated by
5 the CMCR that a military commission would always have jurisdiction to
6 determine its jurisdiction including by a motion challenging the
7 preferral if the charges were defective and jurisdictionally so.

8 Q [MAJ FRAKT]: Okay. Have we touched on this one already?

9 A [PROF MORRIS]: I would like to add only that the separate
10 section not the jurisdiction section, but the definition section of
11 the MCA, we have two different definitions of unlawful combatant
12 status.

13 One, says that as a definition, definitionally the
14 competent tribunal determination is definitional of unlawful
15 combatant status that's odd for a mechanism of procedure to be a
16 definition of the status but it is defining for purposes of
17 establishing the initial or prima facie jurisdiction of a military
18 commission. That's all you need pending appeals don't matter, if you
19 got that that's unlawful combatant for purposes of establishing
20 jurisdiction for trial by military commission.

21 There is also a substantive definition that would be
22 applied by a military commission or by competent tribunal each in
23 turn when they are making the substantive combatant status

1 determination. So there are two definitions to be applied one or the
2 other depending on the phase of the proceedings and what's required
3 at that time.

4 Q [MAJ FRAKT]: All right, did you--you've already seen this
5 language before was there an additional point that you want to make
6 about it?

7 A [PROF MORRIS]: Just to note that the CMCR requirement of the
8 applying of the Charming Betsy and their use of Article 45(2) as a
9 provision that would come under the Charming Betsy Doctrine.

10 Q [MAJ FRAKT]: Now let's move on to subject matter jurisdiction
11 for a moment. You've also said the court lacks subject matter
12 jurisdiction why is that?

13 A [PROF MORRIS]: Because the facts alleged don't state the
14 crime charged.

15 Q [MAJ FRAKT]: Is murder or attempted murder in violation of
16 the law of war is that a war crime? Is there such a thing?

17 A [PROF MORRIS]: There is such a thing.

18 Q [MAJ FRAKT]: And what does it require?

19 A [PROF MORRIS]: It requires that the attempted murder be done
20 in a way or against a target that would make it a war crime
21 violation. That is use of unlawful weaponry for example or the
22 targeting of a protected person who's not a legitimate military

1 target. Either of those would cause to be caused the attempted
2 killing, attempted murder to be in violation of the law war.

3 Otherwise an attempted killing by a person without
4 combatant immunity would be murder or some other domestic crime, but
5 if it's not done in a manner that is contrary to the law of war
6 against the protected persons it is not a war crime.

7 Q [MAJ FRAKT]: So Judge Allred gave this instruction to the
8 court members in the Hamdan case and later apparently he said
9 something, according to the prosecution that maybe he made a mistake.
10 Did he make a mistake or did he give a correct instruction to the
11 members?

12 A [PROF MORRIS]: He was absolutely correct in his instruction
13 to the members. My understanding was that when there was a request
14 to recharge the jury what he said was, I might be right or wrong
15 here, but it's too late for this.

16 Q [MAJ FRAKT]: And this--are you familiar with the definition
17 of murder in the violation of the law of war and the war crimes act,
18 the U.S. War Crimes Act.

19 A [PROF MORRIS]: I believe that it requires that the target or
20 the method used is a violation of the law of war and I'm trying to
21 recall whether it also requires that it be grave breach under the
22 Geneva Conventions.

1 Q [MAJ FRAKT]: Is that U.S. war crime statute; is it consistent
2 with Judge Allred's instruction?

3 A [PROF MORRIS]: Utterly consistent.

4 Q [MAJ FRAKT]: And it is the U.S. War Crimes Act intended to be
5 a codification of international war crimes?

6 A [PROF MORRIS]: That's exactly what it is intended to be.

7 Q [MAJ FRAKT]: And the MCA also states, Congress stated that it
8 was a codification of the existing international law, correct?

9 A [PROF MORRIS]: It does state that, yes.

10 Q [MAJ FRAKT]: Has anything changed since the U.S. War Crimes
11 Statute was passed?

12 A [PROF MORRIS]: Not relevant to this matter.

13 Q [MAJ FRAKT]: One other issue that I want to take up is the
14 issue of child soldiers. I'm using that term interchangeably with
15 juvenile, minor, I mean someone under 18 at the time they were
16 captured, in a war zone, accused of some acts of combat. Is there a
17 strict prohibition against the prosecution of a child soldier under
18 international law?

19 A [PROF MORRIS]: Not per se against the prosecution of a child
20 soldier, it's, it's a matter under debate, it's controversial. The
21 international criminal Court has no jurisdictional over child
22 soldiers; the international criminal tribunals for former Yugoslavia

1 and Rwanda have no specification in their statute but have never
2 prosecuted a minor.

3 The Special Court for Sierra Leone is appointed to as they
4 international war crimes court that does have jurisdiction over
5 minors, but that said the statute prohibits the court from sentencing
6 a minor to any term of imprisonment, requires that the sentencing as
7 well as the treatment during trial be geared towards rehabilitation.

8 And because the Statute of the Special Court for Sierra
9 Leone says that the purpose of the court is to try those most
10 responsible for the crimes committed. The prosecutor of the court,
11 at least at the--well at the time when I was counsel to the
12 prosecutor and subsequently as well has decided that by definition
13 that a statute would not apply to the prosecution of child soldiers,
14 because they are not among those most responsible.

15 Q [MAJ FRAKT]: So in modern history has there ever been a
16 prosecution of a child soldier in an international war crimes
17 tribunal?

18 A [PROF MORRIS]: None to my knowledge.

19 Q [MAJ FRAKT]: And you have studied the issue?

20 A [PROF MORRIS]: Yes.

21 Q [MAJ FRAKT]: Now, turning to the Military Commissions Act
22 itself, the prosecution says that that's the sole source of law that

1 we should look to here. Does the Military Commissions Act address
2 the issue of jurisdiction over child soldiers?

3 A [PROF MORRIS]: No, it does not.

4 Q [MAJ FRAKT]: So it is completely silent on the issue?

5 A [PROF MORRIS]: Completely silent.

6 Q [MAJ FRAKT]: And have you done a legislative history search
7 of the Military Commissions Act?

8 A [PROF MORRIS]: Yes I have done an extensive search.

9 Q [MAJ FRAKT]: Was there any discussion by any member of
10 Congress about child soldiers?

11 A [PROF MORRIS]: There was no discussion at any time by any
12 member of Congress on the question of child soldiers or any
13 individual held in Guantánamo as a minor none what so ever.

14 Q [MAJ FRAKT]: No mention of the word juvenile?

15 A [PROF MORRIS]: None.

16 Q [MAJ FRAKT]: Minor?

17 A [PROF MORRIS]: No.

18 Q [MAJ FRAKT]: Omar Khadr?

19 A [PROF MORRIS]: No.

20 Q [MAJ FRAKT]: Mohammed Jawad?

21 A [PROF MORRIS]: None.

1 Q [MAJ FRAKT]: So it's completely, the congressional record is
2 completely devoid of any reference to any juvenile being held at
3 Guantánamo or to be tried as a war criminal?

4 A [PROF MORRIS]: That's right.

5 Q [MAJ FRAKT]: Would it be a significant policy decision for
6 the United States to choose to prosecute war criminals or children
7 excuse me as war criminals?

8 A [PROF MORRIS]: Yes. It would be an enormous policy decision.
9 It would place us in a position contrary to our major allies----

10 TC [LTC STEVENSON]: Objection, Your Honor, we are talking about
11 policy; political decisions thought the substances testimony was
12 legal.

13 MJ [COL HENLEY]: I think the commission has recognized the
14 witness as an expert. I think we can hear her opinion on the matter.
15 Overruled.

16 A [PROF MORRIS]: The policy decision would be very significant
17 and very surprising. It would be significant because it would be
18 contrary to the tread in international law and in particular to the
19 positions strongly taken by our allies on the question. It would
20 also be surprising because the United States was leader of really in
21 the creation of the Special Court for Sierra Leone and although
22 Sierra Leoneans wanted full prosecution of juveniles the United
23 States supported the view that any prosecution should be very much

1 limited, made a concession to the Sierra Leoneans as to their
2 preference for prosecution, but was entirely on board and active in
3 precluding any sentence of imprisonment for a minor.

4 Q [MAJ FRAKT]: And how generally are child soldiers viewed
5 under international law?

6 A [PROF MORRIS]: They have to be protected as they have not
7 been previously that is to say the recruitment of child soldiers is a
8 crime under international law. Children are viewed as victims and
9 indeed generally are they don't have the resources in any sense to
10 resist the kinds of means that are used recruit them as child
11 soldiers. They generally do as they are told and frequently are
12 abused, are drugged, are treated in various ways such that when they
13 are finally taking out of that position. They are treated very
14 solicitously and complete either their rehabilitation.

15 Q [MAJ FRAKT]: And so if this court, commission were to decide
16 that it could try a child soldier would there be any requirements
17 under U.S. treaty obligations to do anything special for those
18 children?

19 A [PROF MORRIS]: Certainly, the requirements are very clear
20 that throughout that child's captivity and prosecution and anytime
21 subsequent that individual would have to be treated especially. What
22 had to be separated from adult prisoners would have to be given such

1 treatment as was needed to promote every possibility for their
2 rehabilitation.

3 Q [MAJ FRAKT]: And have you seen any provisions like that in
4 the MCA or in the Manual for Military Commissions anywhere?

5 A [PROF MORRIS]: No there is no provision that I have seen,
6 there is no provision for special treatment for juveniles or anything
7 that would qualify a commission to proceed against a juvenile
8 defendant.

9 Q [MAJ FRAKT]: And is there a defense of infancy under the
10 military commissions act or its implement regulations?

11 A [PROF MORRIS]: No there is no defense for infancy there is a,
12 there is mens rea issues that could come into play with regard to
13 juveniles as to whether a juvenile can even form an adequate a full
14 mens rea, but there is nothing specified with regards to juveniles,
15 no.

16 Q [MAJ FRAKT]: But under the government's interpretation even a
17 five year old could be charged with a war crime under the MCA is that
18 a fair reading of what they have submitted?

19 A [PROF MORRIS]: That seems to be.

20 Q [MAJ FRAKT]: And would that be consistent with international
21 law?

1 Q [LTC STEVENSON]: I'd like to kind of start in no particular
2 order, but let me focus my questions first of all on your
3 testimony regarding child soldiers and just to reiterate and kind of
4 set the stage. You have already mention that the military commission
5 act sets no limitations on any of these offenses that can be alleged
6 based on age, is that correct?

7 A [PROF MORRIS]: It doesn't address juvenality at all.

8 Q [LTC STEVENSON]: I'm talking a little bit about international
9 law and EU law and EU opinion having just come from a NATO position
10 I'm very sensitive to that but let's talk a little bit more about
11 U.S. jurisprudence here for a minute. Now there may not be a lot of
12 precedents with the Europeans but certainly it would be fair to say
13 that in the U.S. are certainly precedents for charge and convicting
14 the sentencing those under 18 for crimes as an adult, isn't that
15 correct?

16 A [PROF MORRIS]: Certainly.

17 Q [LTC STEVENSON]: Many, many states under the federal courts,
18 we can try juveniles for adult crimes, is that correct?

19 A [PROF MORRIS]: Not in military courts but in state courts,
20 yes.

21 Q [LTC STEVENSON]: Right, well were dealing with a commission,
22 we are all dealing with new law here so I'm trying as you are compare
23 other systems to kind of deal with the issues that we are facing in

1 this new commission world. So under U.S. jurisdiction, criminal
2 jurisdiction state, federal there is precedents for trying those
3 under 18.

4 A [PROF MORRIS]: Absolutely.

5 Q [LTC STEVENSON]: And sentencing them and punishing them as
6 adults?

7 A [PROF MORRIS]: That's correct.

8 Q [LTC STEVENSON]: Now, now the substance of your testimony if
9 we could synopsise it would be that your testimony with a few
10 exceptions as we focus on your opinion of what the law is, would that
11 be correct?

12 A [PROF MORRIS]: My knowledge of what the law is.

13 Q [LTC STEVENSON]: But it has all been, right, your opinion on
14 what the law is based on your knowledge and expertise and experience,
15 right, it's been your opinion that you have been expressing here in
16 the last hour?

17 A [PROF MORRIS]: I've based it on materials that I've shown you
18 and I'm certain my opinion certainly is that these are correct, yes.

19 Q [LTC STEVENSON]: Okay but they are your opinions correct?

20 A [PROF MORRIS]: Yes.

21 DC [MAJ FRAKT]: Objection, badgering, irrelevant.

22 MJ [COL HENLEY]: Overruled.

1 Q [LTC STEVENSON]: Do you understand the question ma'am? What
2 you have been testifying to here in response to Major Frakt's
3 question, you have been giving hypotheticals and asked to interpret
4 certain things that you have been giving your legal, your word is
5 legal opinion.

6 A [PROF MORRIS]: I guess the answer is some of each. Some has
7 been opinion and interpretation; some has been presentation of actual
8 text.

9 Q [LTC STEVENSON]: Okay. Now would you agree that there are
10 other experts in your particular field, the legal field and
11 specifically the field of the law of war who might share different
12 opinions that you have?

13 A [PROF MORRIS]: I'm sure there are.

14 Q [LTC STEVENSON]: You are sure there are. Ma'am do you know
15 Mr. W. Hays Parks?

16 A [PROF MORRIS]: I did.

17 Q [LTC STEVENSON]: Have you met him?

18 A [PROF MORRIS]: I have.

19 Q [LTC STEVENSON]: Would it surprise you if he for example had
20 some different opinions specifically as to what you have presented
21 here in the commission proceedings today?

22 A [PROF MORRIS]: It would surprise me in part; it would
23 surprise me if he did after we spoke.

1 Q [LTC STEVENSON]: But including him and including everyone you
2 would agree that this is an area where there is not universal
3 agreements?

4 DC [MAJ FRAKT]: Objection. The question is so non-specific;
5 this is irrelevant. She gave a wide variety of testimony on a wide
6 variety of issues, if there are specific experts that disagree on
7 specific points of law then that's fair cross-examination question,
8 but just to say are there some so-called experts somewhere in the
9 world who may disagree with something that you said is just
10 completely irrelevant.

11 MJ [COL HENLEY]: It might help the commission if you could
12 orient the witness to if there is a dispute as to a particular point
13 raised during direct.

14 Q [LTC STEVENSON]: Ma'am as to your opinions as to whether
15 there is subject matter jurisdiction whether you're opinion as to in
16 personam jurisdiction as it relates to this commission there might
17 be--it wouldn't surprise you that other experts in the field have
18 different opinions.

19 A [PROF MORRIS]: It would surprise me if another expert in the
20 field believed that attacking a military target, a soldier, an enemy
21 combatant was a war crime. It would surprise me if an expert
22 believed that Article 45(2) did not require a separate de novo review

1 after a competent tribunal determination. Are there other points
2 then?

3 Q [LTC STEVENSON]: And would it surprise you if Mr. W. Hays
4 Parks said based on the same things you testified that this court
5 does have jurisdiction over these particular war crimes in person and
6 subject matter?

7 A [PROF MORRIS]: I don't know whether it would be a different
8 opinion because I don't know what he would be basing that on the
9 particular view.

10 Q [LTC STEVENSON]: Have you seen the flurry of writings
11 recently and the blinds on this issue, this particular issue, his
12 opinions?

13 A [PROF MORRIS]: Of course.

14 Q [LTC STEVENSON]: And they have different that would be fair
15 to say wouldn't it?

16 A [PROF MORRIS]: Not on defective preferrals.

17 Q [LTC STEVENSON]: That's a novel issue and we are going to get
18 to this novel issue of defective preferrals specifically as it
19 relates to the Khadr decision in a moment. In fact let's talk about
20 Khadr right now. Let's kind of walk through you focused on the one
21 difference between the instant situation that we have here in Khadr
22 is the preferral issue. In both--Mr. Khadr's case and Mr. Jawad's

1 case a CSRT determined that both individuals were enemy combatants,
2 correct?

3 A [PROF MORRIS]: Yes.

4 Q [LTC STEVENSON]: And then they were in both cases there was a
5 swearing of charges, correct?

6 A [PROF MORRIS]: Correct.

7 Q [LTC STEVENSON]: And then in both, well in the Khadr decision
8 there was a commission proceeding and there in the Khadr commission
9 proceeding the Military Judge dismissed the charges?

10 A [PROF MORRIS]: That's correct without prejudice.

11 Q [LTC STEVENSON]: And that court determined that they were not
12 a proper tribunal in the Khadr commission level, the Khadr court
13 determined, commission determined that they where not a proper
14 tribunal for determining jurisdiction, correct?

15 A [PROF MORRIS]: They stated that he did not have, that he
16 should not determine whether he had jurisdiction.

17 Q [LTC STEVENSON]: And at the Appellate Level the CMCR that was
18 that decision was reversed correct?

19 A [PROF MORRIS]: Correct.

20 Q [LTC STEVENSON]: And at that higher appellate level they said
21 Military Judge could have and should have, well could have determined
22 jurisdiction and should have allowed the government to present
23 evidence to establish unlawful enemy combatancy, correct?

1 A [PROF MORRIS]: They responded to the issue before them by
2 stating that there was nothing before them that would cause them to
3 say that he couldn't that he did not have jurisdiction to establish
4 his jurisdiction.

5 Q [LTC STEVENSON]: They said he could have and they should have
6 allowed the government to establish jurisdiction did the court not
7 say that?

8 A [PROF MORRIS]: Yes, the court did say that absolutely based
9 on the question before it.

10 Q [LTC STEVENSON]: So I'm trying to understand where the
11 factual situation in the Khadr decision differs other than we haven't
12 had a ruling by the Military Judge from the situation at hand here.
13 You say its defective preferral. We had two CSRT proceedings were
14 enemy combatancy was established. A determination that that was not
15 a proper determination so was the difference?

16 A [PROF MORRIS]: Is the question not----

17 Q [LTC STEVENSON]: Why doesn't Khadr apply here, why doesn't
18 Khadr apply here?

19 A [PROF MORRIS]: Any statute, brand new statute is subject to
20 challenge and almost invariably takes more than one judicial
21 proceeding to interpret. When an appellate court has interpreted a
22 statute in relation to certain challenges that were brought it
23 doesn't preclude other challenges from being brought subsequently and

1 when those are that appellate court presumably we would have the
2 opportunity to decide those issues. They are not precluded by a
3 ruling.

4 Q [LTC STEVENSON]: I think I understand. So factually or
5 procedurally the facts of each case are different, procedurally the
6 Khadr decision line tracks this decision line it's identical. We
7 have a CSRT proceeding, where enemy combatancy is established and we
8 have, we are at the commission and we are at the point where we
9 determine whether its jurisdiction. We had a swearing of charges.
10 We had a referral.

11 A [PROF MORRIS]: The difference in the Khadr case was that
12 there was no prior CMC that had ruled on part of the jurisdictional
13 issue and had indicated that military commission always has
14 jurisdiction and should determine its own jurisdiction applying the
15 law to the facts.

16 Q [LTC STEVENSON]: And actually so that's why we're here, a
17 military commission has jurisdiction to determine whether it has
18 jurisdiction does it not?

19 A [PROF MORRIS]: Yes.

20 Q [LTC STEVENSON]: Just like the Khadr decision.

21 A [PROF MORRIS]: And it must apply the law which is that the
22 person is a lawful combatant until a competent tribunal is determined
23 otherwise a question that wasn't raised prior to now.

1 Q [LTC STEVENSON]: That specific question was not raised from
2 what we can see but the situations were identical from a case posture
3 standpoint is that not correct?

4 A [PROF MORRIS]: When they came to the CMCR?

5 Q [LTC STEVENSON]: Yes, other than we had a dismissal there,
6 which was what brought it up there, but the Khadr case----

7 A [PROF MORRIS]: Procedurally, yes, they were at the same
8 posture----

9 Q [LTC STEVENSON]: ----they were----

10 A [PROF MORRIS]: ----after the dismissal apart from the
11 dismissal.

12 Q [LTC STEVENSON]: ----right as far as legal steps that had
13 taken place.

14 A [PROF MORRIS]: Correct.

15 Q [LTC STEVENSON]: We had a swearing of charges. We had the
16 CSRT determination just like we have here. We had the swearing of
17 charges. And we had the referral and now we are at the commission.
18 They were the same right?

19 A [PROF MORRIS]: In most respects, yes.

20 Q [LTC STEVENSON]: Now, let's talk--let's just shift gears here
21 for a moment and speak about additional Protocol 1, Paragraph 45.
22 Now the court in Khadr said that a pretrial determination by a
23 military commission that they have jurisdiction is consistent with

1 Article 45 of Protocol 1 did it not? Didn't that footnote 38 say
2 that?

3 A [PROF MORRIS]: Footnote 38 said that in their ruling stating
4 that a judicial adjudication of combatant status may be held by a
5 military commission in so holding, they were holding consistently
6 with Article 45(2). They didn't specify in Footnote 38 whether there
7 would or would not need to be a prior determination for an effective
8 referral, preferral, pardon me.

9 Q [LTC STEVENSON]: But in the case they were referring to they
10 had already held there had been a defective prior determination just
11 like here.

12 A [PROF MORRIS]: They had found that there had been no
13 competent tribunal that they could recognize and they were not
14 addressing the question of whether without a competent tribunal there
15 could be an effective preferral of charges.

16 Q [LTC STEVENSON]: They said the charges were facially valid.

17 A [PROF MORRIS]: They said that the government had shown facial
18 compliance with the requirements that they were examining, that is,
19 on the premise that there was an effective preferral then added to
20 that, the pretrial advice and so one that would produce facial
21 compliance again assuming a valid preferral, and one that was not
22 jurisdictionally defective by virtue of being sworn against as you
23 said a lawful of combatant, which would invalidate those charges.

1 Q [LTC STEVENSON]: Well Mr. Jawad was determined to be an enemy
2 combatant.

3 A [PROF MORRIS]: As the CMCRC has said that does not make him an
4 unlawful enemy combatant as a matter of law.

5 Q [LTC STEVENSON]: The same situation we have in the preferral
6 of charges with Mr. Khadr.

7 A [PROF MORRIS]: Excuse me.

8 Q [LTC STEVENSON]: Had we not.

9 A [PROF MORRIS]: In each instance they had a CSRT that did not
10 determine unlawful combatant status.

11 Q [LTC STEVENSON]: That's right, there are the same so the
12 preferrals----

13 DC [MAJ FRAKT]: Objection, objection, asked and answered this
14 question has been asked 10 - 12 times now in different ways,
15 Professor Morris simply disagrees with Colonel Stevenson's
16 characterization that the two were identical. She has made an effort
17 to distinguish the cases which he fails to comprehend that does not
18 give him the right to ask the question over and over and over again.

19 MJ [COL HENLEY]: Overruled.

20 Q [LTC STEVENSON]: Major Frakt maybe right, maybe I don't
21 comprehend that's why I'm just trying to understand because there
22 maybe others in the room that are in the same boat as me so I'll try
23 again.

1 MJ [COL HENLEY]: Counsel, please don't, ask the question, let
2 the witness respond, you don't need to editorialize.

3 Q [LTC STEVENSON]: I apologize. As a point of preferral the
4 case and Mr. Khadr and the case of the accused were the same
5 procedurally correct. We had an enemy combatant determination
6 correct?

7 A [PROF MORRIS]: Yes, the CSRT referring to the----

8 Q [LTC STEVENSON]: Right.

9 A [PROF MORRIS]: ----yes.

10 Q [LTC STEVENSON]: Okay, for Mr. Khadr's case and Mr. Jawad's
11 case?

12 A [PROF MORRIS]: Yes.

13 Q [LTC STEVENSON]: So try to understand why the opinion in the
14 Khadr doesn't apply equally to the situation here and why the
15 Military Judge can't do the same thing at the Khadr court said the
16 Military Judge in that case should have done that's the question?

17 A [PROF MORRIS]: I understand. The CMCR doesn't address that
18 question; the CMCR addresses the question on the premise that there
19 is a valid referral as the CMCR says. Where we have sworn charges
20 before us, but it doesn't address the question of where the charges
21 are jurisdictionally defective because it wasn't asked to address
22 that.

1 Q [LTC STEVENSON]: Now I got it thank you ma'am, I'll move on.
2 Protocol 1, I just showed Protocol 1 has been there has been a lot of
3 talk about it in Article 45. It has been specifically, not just not
4 adopted; it has been specifically renounced by the United States
5 correct?

6 A [PROF MORRIS]: Not with regard to Article 45(2) that has been
7 specifically endorsed by the United States.

8 Q [LTC STEVENSON]: Didn't President Ronald Reagan specifically
9 denounce additional Protocol 1 because he objected as our Commander-
10 in-Chief because of provisions could apply protections to terrorists.

11 A [PROF MORRIS]: When President Reagan introduced the Protocol
12 1, when President Reagan chose not to submit Protocol 1 to the Senate
13 for ratification in his explanation of why that was the case. He
14 said that he with regret was not able to submit for ratification that
15 treaty because there was a great deal in it that the U.S. did
16 support, but that there were certain provisions that the U.S. found
17 important because they would give POW status to terrorist
18 organizations. He specified the articles that would do that. Either
19 in that, in that statement to Congress or collaterally that and those
20 provisions did not include Article 45(1) and (2), which the U.S. then
21 specifically been endorsed.

1 Q [LTC STEVENSON]: Let's talk about the subsequent endorsement.
2 There was a memo by a Deputy Legal Adviser State Department, is that
3 the subsequent endorsement you're speaking on?

4 A [PROF MORRIS]: No. There was a speech in which the legal
5 advisor and the deputy legal adviser announced the official U.S.
6 position on Protocol 1 and specified the articles that the U.S did
7 endorse, the articles that the U.S. did not endorse as is often the
8 case. Official U.S. position is announced in a particular speech and
9 then is recognized thereafter by the government as it has been
10 subsequently as indeed the official position of the United States.

11 Q [LTC STEVENSON]: But as far as official acts that have made
12 it binding law upon us, the status of additional Protocol 1 was it is
13 still rejected?

14 A [PROF MORRIS]: The U.S. has rejected the treaty and adopted
15 as customary to international law binding on the United States
16 Article 45(2) and certain other provisions.

17 Q [LTC STEVENSON]: We recognize it as customary in
18 international law?

19 A [PROF MORRIS]: That's correct and the CMCR in article, pardon
20 me, in Footnote 38 uses that as an example of customary law that
21 would come under the Charming Betsy Doctrine for that reason.

22 Q [LTC STEVENSON]: And again the Charming Betsy and paragraph
23 or Article 45 of additional Protocol 1 have been cited by the Court

1 of Review as in support of saying that a military judge can make that
2 determination, Footnote 38.

3 A [PROF MORRIS]: It doesn't make that as a blanket statement,
4 it makes that in regard to the issues that the court was ruling on.

5 Q [LTC STEVENSON]: Right which is whether the Military Judge in
6 a military commission has jurisdiction to make an unlawful enemy
7 combatant determination.

8 A [PROF MORRIS]: The CMCRC doesn't suggest and couldn't suggest
9 that every jurisdictional issue was now decided, it didn't suggest
10 that a commission hearing, a jurisdictional challenge, subsequently
11 should only address the issues in this one and only----

12 Q [LTC STEVENSON]: Sure.

13 A [PROF MORRIS]: ----traditional interpretation.

14 Q [LTC STEVENSON]: Sure. But given that from the procedural
15 standpoint and again when we have such little precedence in these
16 proceedings. We have two cases, which from a procedural standpoint
17 are pretty much identical. We can draw, this court can draw, this
18 commission can draw a lot from the Khadr decision.

19 A [PROF MORRIS]: Absolutely.

20 Q [LTC STEVENSON]: Now, let me, since your testimony has been
21 as an expert let me that means I get to ask a hypothetical and I----

22 A [PROF MORRIS]: I'm use to those.

1 Q [LTC STEVENSON]: ----I got just one. Let's say we are
2 engaged in armed conflict a big one. It involves, it is in a foreign
3 land and the individuals that we are engaged with are not the
4 foreigners and let's say----

5 A [PROF MORRIS]: I'm sorry they are not?

6 Q [LTC STEVENSON]: It's in a foreign land and we are dealing
7 with foreigners in an armed conflict a big one. And let's say we
8 have one individual a young man who's a member of a particular group
9 and that group has expressed openly hostility towards the United
10 States, towards its people, towards the ideals that the United States
11 stands for. So this group's ideology is openly hostile to what we
12 stand for as Americans okay. That's a hypothetical.

13 A [PROF MORRIS]: That's a hypothetical?

14 Q [LTC STEVENSON]: Yes it is. I'm going to move on I have more
15 facts. And I will repeat any if you want me to. Alright we have
16 this young man and let's say this young man who belongs to this group
17 that has openly expressed hostilities towards America and America's
18 way of life is in a public, a market place, a very crowded public
19 marketplace with there are lots of people and he's dressed in a very
20 inconspicuous way, in fact he is dressed identically or as much as
21 possible to blend in with the other people to not stand out. So he
22 is in this public place, it's very crowded, attempting to blend in to
23 keep a very low profile.

1 And the reason that he is trying to do that is because
2 foreign troops are present, foreign armed troops, including U.S.
3 troops in vehicles and they are driving by. And lets in this
4 hypothetical say this young man, who is in this credit place trying
5 to blend in is waiting for this group to drive by, but he waits for
6 the U.S. vehicle, carrying US soldiers to drive by. And he waves to
7 them, he says hello, hello and as soon as that vehicle drives by he
8 pulls a pin on a hand grenade and throws it in the vehicle and that
9 hand grenade explodes. With that factual scenario ma'am is that a
10 violation of the law war?

11 A [PROF MORRIS]: Not one that could be charged in this case.

12 Q [LTC STEVENSON]: That's the beauty of hypothetical's, just
13 based on that hypothetical, not based on what's happening in this
14 case, based on that hypothetical I gave you is that young man
15 throwing a hand grenade, a violation of the law of war?

16 A [PROF MORRIS]: And you are suggesting that the young man is a
17 member of the group that is in the armed conflict with the United
18 States, he's not a member of the different group.

19 Q [LTC STEVENSON]: He is a member, he's a member of a group
20 that is openly hostile to the United States and is expressed that.
21 I'm focusing more on the conduct of the young man. Are you, ma'am
22 are you aware of the concept of perfidy?

1 A [PROF MORRIS]: Yes, it would not be perfidy necessarily; it
2 would depend on whether he had sought to invite the confidence of his
3 then target, for the purpose of the attack, if the hypothetical
4 includes that. He had----

5 Q [LTC STEVENSON]: Waving hello, hello and blending in under
6 those facts do we have a situation, which at least raises the
7 possibility of a law of war violation?

8 A [PROF MORRIS]: Oh yes.

9 Q [LTC STEVENSON]: Okay.

10 A [PROF MORRIS]: That would be the violation of perfidy, which
11 is provided for in the MCA as a distinct crime.

12 Q [LTC STEVENSON]: So under that factual scenario we would----

13 A [PROF MORRIS]: Under that scenario.

14 Q [LTC STEVENSON]: ----yes and that's the only scenario.

15 A [PROF MORRIS]: If that were charged that would be
16 entertainable.

17 Q [LTC STEVENSON]: Give me one moment if you would, Your Honor.
18 And you would agree ma'am as a professor in international law with
19 expertise in law of war that perfidy would not need to be charged it
20 would have to be proved, but he would not need to be specifically
21 charged?

22 A [PROF MORRIS]: No I don't take that position.

23 Q [LTC STEVENSON]: No.

1 A [PROF MORRIS]: No.

2 Q [LTC STEVENSON]: The facts and circumstances, if these
3 charges are violation of the law of war and the facts and
4 circumstances as they play out in----

5 DC [MAJ FRAKT]: Objection, relevance no one is charged with
6 perfidy. There is nothing in this--where is this, what is this
7 about.

8 MJ [COL HENLEY]: Overruled.

9 Q [LTC STEVENSON]: ----assuming someone is charged with the law
10 of war violation, attempted murder in violation of the law of war
11 specifically and facts and circumstances as they play out in court
12 and evidence establishes that that very factual scenario that I
13 presented. In fact happened that person could be convicted as
14 charged, convicted as charge of attempted murder in violation of the
15 law of war. Those facts and circumstances came out of a fact finder,
16 could determine that that person is guilty of a violation of a law of
17 war.

18 A [PROF MORRIS]: No I don't think so. The requirement for a
19 war crime of murder in violation of the law of war would turn on the
20 weapon used, the target certainly----

21 Q [LTC STEVENSON]: Perfidy doesn't require, perfidy requires a
22 weapon, well what's the weapon used.

23 A [PROF MORRIS]: I was going to list the possibilities.

1 Q [LTC STEVENSON]: Okay.

2 Q [LTC STEVENSON]: Weaponry, the target, the method used for
3 the attack, if the perfidy would be a separate offense that could be
4 charged and perhaps proven but I don't--in the definition of murder
5 in violation of the law of war. You would have to go to combat
6 methodology and target them.

7 Q [LTC STEVENSON]: What if the combat methodology is to lull
8 the lawful combatants into complacency by saying hello friend and
9 waving.

10 A [PROF MORRIS]: I'm not seeing a perfidy used in combination
11 with murder in violation of the law of war provision and I'm not
12 seeing it listed within a methodology problem like the Hague
13 conventions only seen it with spying and sabotage as a separate
14 crime.

15 Q [LTC STEVENSON]: But perfidy can clearly involve human
16 actions in violation of the law of war trickery, treachery----

17 A [PROF MORRIS]: It would have to include human actions.

18 Q [LTC STEVENSON]: Say again.

19 A [PROF MORRIS]: It would have to include human actions.

20 Q [LTC STEVENSON]: But if those facts played out we could have
21 a situation where an attempted murder were a violation of the law of
22 war, if the right facts were presented in the court of law or in this
23 commission.

1 A [PROF MORRIS]: Not under any murder in violation of the law,
2 murder violation of the law war provisions that I've seen, no.

3 Q [LTC STEVENSON]: You haven't seen it yet, but legally you're
4 not saying it couldn't happen.

5 DC [MAJ FRAKT]: Objection it's asked and answered repeatedly.

6 MJ [COL HENLEY]: Overruled.

7 Q [LTC STEVENSON]: And it's not surprising you haven't seen
8 that we're dealing with a whole new type of war here.

9 A [PROF MORRIS]: I'm thinking it through. You have to use
10 deception well----

11 Q [LTC STEVENSON]: Hello friend.

12 A [PROF MORRIS]: Excuse me you also have to convince the person
13 that you are somebody who he would have interaction with and have
14 reason to trust and place confidence in on an official basis, in fact
15 now that I am thinking about perfidy, which I had not in relation to
16 this case. You have to demonstrate that you have an official status
17 as a in a humanitarian context. There are certain requirements, and
18 again I have not thought about perfidy in relation to this case, but
19 there are requirements now that I think about it that would not be
20 present in the hypothetical you suggested.

21 Q [LTC STEVENSON]: But certain human actions could amount to
22 rise to such a level that they could be in violation of law of war?

1 Q [MAJ FRAKT]: Did they do anything that suggested they were
2 overruling any background law on child soldiers or juvenile?

3 A [PROF MORRIS]: Not a word in the statute or the history, no.

4 Q [MAJ FRAKT]: And you were asked if it is possible for
5 juveniles to be tried as adults in the United States and obviously
6 you have taught criminal law, right?

7 A [PROF MORRIS]: Yes, I have.

8 Q [MAJ FRAKT]: Where that happens isn't it true that there is
9 typically some form of hearing held to determine whether the juvenile
10 should be tried as an adult?

11 A [PROF MORRIS]: Always.

12 Q [MAJ FRAKT]: So the presumption is the juvenile will be tried
13 as a juvenile and the state has a burden to overcome that presumption
14 to treat him as an adult?

15 A [PROF MORRIS]: Absolutely and if that presumption is overcome
16 then there are additional, there is an additional set of restrictions
17 on sentencing and requirements for special treatment within the
18 sentence imposed.

19 Q [MAJ FRAKT]: And let's talk about perfidy for a moment.
20 Perfidy requires does it not that the, the war criminal, the
21 perfidious actor try or gain the confidence of the victim, right?

22 A [PROF MORRIS]: That's right.

1 Q [MAJ FRAKT]: Wouldn't an example of that be pretending to
2 surrender with a flag of surrender for example?

3 A [PROF MORRIS]: That's the central example usually used.

4 Q [MAJ FRAKT]: So to lull the enemy into thinking that they are
5 dealing with a protected person for example?

6 A [PROF MORRIS]: Absolutely.

7 Q [MAJ FRAKT]: And in the Army Field Manual, I think they give
8 some examples of a soldier fainting being a civilian, so removing the
9 uniform and putting on civilian clothes would that an example?

10 A [PROF MORRIS]: The Field Manual is very specific that in its
11 discussion of civilian clothing that that clothing has to be worn by
12 a combatant for the purpose of deceiving. It is very specific in the
13 field manual that if somebody was just normally wearing civilian
14 clothing. They did never wear a uniform that would not be within the
15 field manual definition.

16 Q [MAJ FRAKT]: So if they are wearing civilian clothes because
17 they are civilian that's not perfidy?

18 A [PROF MORRIS]: Or for any other reason other than to deceive.

19 Q [MAJ FRAKT]: And if a military vehicle containing soldiers
20 were driving through a bazaar and they weren't drawn there or invited
21 there because someone was pretending to be a civilian that doesn't
22 sound like perfidy to you does it?

1 A [PROF MORRIS]: No, I have heard of many instances where
2 combatants on enemy sides of a conflict are not constantly hostile
3 and instances indeed where they act friendly and then when engaged in
4 combat kill each other.

5 Q [MAJ FRAKT]: Is an ambush or sneak attack is that perfidy?

6 A [PROF MORRIS]: No, not at all. No in fact that is usually
7 successful.

8 Q [MAJ FRAKT]: If you creep up behind somebody and throw in a
9 hand grenade in and they never saw you at all that couldn't be
10 perfidy could it?

11 A [PROF MORRIS]: Not unless you went behind enemy lines as a
12 saboteur and so on, but no absolutely not. I mean that would be
13 typical military maneuvers in order to gain a military advantage very
14 legitimate.

15 Q [MAJ FRAKT]: Now the prosecutor said repeatedly that this
16 case and the Khadr case are an identical posture or procedural
17 posture but, I want to highlight some or ask you about that. When
18 Judge Brownback dismissed for lack of personal jurisdiction the Khadr
19 case, he did that sua sponte didn't he?

20 A [PROF MORRIS]: That's correct the counsel had changed
21 immediately before that and there was no presentation in fact, he did
22 immediately upon the opening of proceedings.

1 Q [MAJ FRAKT]: So there wasn't even a motion filed by the
2 defense to dismiss it for lack of personal jurisdiction?

3 A [PROF MORRIS]: No motion filed by the defense at all the
4 defense had just come to the case.

5 Q [MAJ FRAKT]: So to say that the posture, the procedural
6 posture is identical is really not accurate is it?

7 A [PROF MORRIS]: You're right.

8 Q [MAJ FRAKT]: And Judge Brownback in his ruling didn't say
9 anything about defective preferral?

10 A [PROF MORRIS]: He said I'm not requiring the government to
11 have the charges re-sworn. One could, I believe he said.

12 Q [MAJ FRAKT]: Let me rephrase the question that simply was not
13 the issue raised at the CMCR defective preferral of charges?

14 A [PROF MORRIS]: It was never raised at the CMCR, it was never
15 raised to Judge Brownback and he specified that that was not the
16 basis for his ruling. The CMCR would not have been moved to address
17 the issue; he had specifically reserved it in his ruling that is
18 Judge Brownback.

19 Q [MAJ FRAKT]: And generally speaking courts of appeal rule on
20 the narrowest possible grounds isn't that true?

21 A [PROF MORRIS]: Absolutely.

22 Q [MAJ FRAKT]: And they don't address issues that are not
23 before them?

1 Q [COL HENLEY]: Is there a requirement that the child be in an
2 organized militia or an Army or otherwise hold him or herself out as
3 a soldier or?

4 A [PROF MORRIS]: Not at all the, most child soldier issues
5 arise within the last decade for the great bulk of them is in Africa
6 and the size, in the conflicts for example in Sierra Leone are very
7 ill-defined, lots of small warlords and village level kind of thugs
8 requiring children to do various things various hideous things. And
9 there's no requirement to show that, which particular group they've
10 been recruited into or pressed into service for if they've committed
11 acts. For example against civilians in the context of their being
12 determined to be combatants then they would be covered as child
13 soldiers for purposes of their treatment relative to prosecution. I
14 don't know if that's responsive.

15 Q [COL HENLEY]: Could a random act of violence committed by a
16 15-year-old in a war zone that person would be considered a child
17 soldier?

18 A [PROF MORRIS]: If they were acting pursuant to the direction
19 of an individual who was directing a group that was taking part in
20 that armed conflict.

21 Q [COL HENLEY]: Implicit in the definition is some structural
22 organization?

1 A [PROF MORRIS]: That's right. It may not be identified party
2 in a more formal way but yes.

3 Q [COL HENLEY]: Understood but it's not an individual operating
4 independent?

5 A [PROF MORRIS]: Absolutely not.

6 Q [COL HENLEY]: You are familiar with the outcome of last
7 week's commission?

8 A [PROF MORRIS]: Yes.

9 Q [COL HENLEY]: Is it your opinion that that commission lacked
10 personal and subject matter jurisdiction over Mr. Hamdan?

11 A [PROF MORRIS]: There is no question in my mind that, that's
12 correct. The waiver was invalid as to the competent tribunal issue
13 and because you can't waive POW rights and the--did you say personal
14 and subject matter?

15 Q [COL HENLEY]: Yes.

16 A [PROF MORRIS]: Actually yes, because it is an Article 1
17 tribunal and neither conspiracy nor material support is a war crime,
18 which Article 1 courts are limited. Very narrowly limited, military
19 courts, law of war courts, as they were called in the Hamdan decision
20 by the Supreme Court are limited in their scope to war crimes for
21 reasons I could go to if you wanted me to, but yes.

22 Q [COL HENLEY]: I wanted to clarify I believe I understood that
23 to be your position and apparently it is so.

1 A [PROF MORRIS]: Yes it is.

2 Q [COL HENLEY]: Do you attach any significance to the fact that
3 Congress established that one element that must be proven by the
4 government beyond a reasonable doubt in all military commission
5 cases. Is that the accused at the time of the alleged offense was an
6 alien unlawful enemy combatant?

7 A [PROF MORRIS]: Do I believe that significant?

8 Q [COL HENLEY]: Do you attach any significance that that is an
9 element?

10 A [PROF MORRIS]: Yes, I believe that the status determination
11 would have be proven by a preponderance when its raised as a
12 jurisdictional motion and subsequently that status would have to be
13 proven beyond a reasonable doubt as an element.

14 Q [COL HENLEY]: And if the commission were to find beyond a
15 reasonable doubt that status wouldn't it have incorporated the
16 initial finding by preponderance?

17 A [PROF MORRIS]: The 45(2) requirement is that the adjudication
18 of status be done whenever possible prior to trial. Certainly that's
19 possible under these circumstances. So you wouldn't work backwards
20 from finding on the merits of an element to then establish
21 jurisdiction.

1 Q [COL HENLEY]: Are you aware of prior tribunals that an
2 element of the offense was the accused status, which got that
3 individual to the tribunal in the first place.

4 A [PROF MORRIS]: Of course.

5 Q [COL HENLEY]: That was set out in the statute that's an
6 element that must be proven by the tribunal?

7 A [PROF MORRIS]: There are--there would be, I think in a
8 courts-martial, being in military service at the relevant time would
9 be jurisdictional and probably in some instances also an element of
10 the crime.

11 Q [COL HENLEY]: Maybe I am not making myself clear and
12 apologize, is there any significance that you draw from the fact that
13 Congress added status as an additional element of the offense, which
14 must be proven beyond a reasonable doubt at trial. Not only the
15 military commissions can only try an alien unlawful enemy combatants
16 to get them into the commission, but now the commission must find
17 beyond a reasonable doubt as an element established by Congress as to
18 that offense. I believe every offense.

19 A [PROF MORRIS]: Yes, it is every offense. Actually Congress
20 the MCA has at the beginning of the offense of every offense person
21 subject to this chapter. In other words people subject to military
22 commission jurisdiction so that the unlawful alien combatant

1 provision is brought in as element in that way. Then in the rules it
2 is added at the end as well in the context of armed conflict.

3 So they word them differently but it's reiterated, it's in
4 the MCA and then it's reiterated in the rules the same substance. It
5 has enormous and various kinds of significance. It requires for one
6 thing that the group in question was engaged in hostilities against
7 the United States or its allies and that the person, that the person
8 acted in the context of an armed conflict.

9 So it requires then that the comment that it be shown that
10 the United States is in armed conflict with that group with the
11 relevant group. The AUMF, the Authorization for the Use of Military
12 Force specifies that the president is authorized to use military
13 force against the state's organizations or individuals responsible
14 for planning or carrying out the 9/11 attacks. So not every group
15 would be therefore a part of the authorized armed conflict and
16 therefore a group that would come within the definition in the MCA of
17 a group acting in the context of an armed conflict.

18 The armed conflict that's recognized under the MCA going
19 back to the AUMF is an armed conflict with those who planned and
20 carried out the September 11 attacks, not any collateral hostility
21 that maybe happening with other groups in various countries. Does
22 that go to your question?

1 MJ [COL HENLEY]: Yes. Thank you. Questions based on the
2 commissions Major Frakt?

3 DC [MAJ FRAKT]: Nothing further.

4 TC [LTC STEVENSON]: No sir, thank you.

5 MJ [COL HENLEY]: Professor thank you very much for your
6 testimony. You can step down let me just remind you don't discuss
7 your testimony with anybody except for the attorneys.

8 WIT [PROF MORRIS]: Thank you.

9 DC [MAJ FRAKT]: May Professor Morris have permission to remain
10 in the courtroom for argument if she so desires, if we have it.

11 MJ [COL HENLEY]: I think you have--is that counsels preference
12 since we have a session set for tomorrow morning beginning at 830
13 correct?

14 DC [MAJ FRAKT]: I just wanted permission for her to come to the
15 courtroom if there are other proceedings.

16 MJ [COL HENLEY]: She can whenever we have the argument she can
17 attend.

18 DC [MAJ FRAKT]: Okay.

19 MJ [COL HENLEY]: I'm asking whether it's necessary that we hear
20 argument this evening.

21 DC [MAJ FRAKT]: Not necessarily Your Honor, I thought earlier
22 you said you wanted to hear argument on motion that we had concluded,
23 but it is getting late so we----

1 MJ [COL HENLEY]: We are going to break. How long we break is
2 up to counsel. Are you asking that we continue with argument on D4
3 and D8 tonight?

4 DC [MAJ FRAKT]: No, I wanted to argue the jurisdictional
5 motions tonight and continue with D4 and D8 tomorrow with additional
6 witness testimony.

7 MJ [COL HENLEY]: How long is your argument?

8 DC [MAJ FRAKT]: Now one of my famous lengthy speeches Your
9 Honor.

10 MJ [COL HENLEY]: Less than five minutes?

11 DC [MAJ FRAKT]: Sure.

12 MJ [COL HENLEY]: Trial counsel what's your preference?

13 TC [LTC VANDEVELD]: We will stick to the same time Your Honor.

14 MJ [COL HENLEY]: Can we proceeding immediately to argument or
15 do you need a recess, does Mr. Jawad make a recess?

16 [Defense counsel asked Mr. Jawad if he needs a break.]

17 MJ [COL HENLEY]: I think 732 is the next prayer time.

18 DC [MAJ FRAKT]: Okay.

19 MJ [COL HENLEY]: 731.

20 DC [MAJ FRAKT]: May I proceed with argument.

21 MJ [COL HENLEY]: Yes.

22 DC [MAJ FRAKT]: Okay. Thank you Your Honor. This court, this
23 commission is being asked to do something for the first time in

1 modern history based on a complete and total absence of any evidence
2 of congressional intent to try a child soldier. A significant and
3 weighty policy decision that would be contrary to previously stated
4 U.S. positions and positions of all of our allies.

5 MJ [COL HENLEY]: Counsel can I just stop you for a second.

6 DC [MAJ FRAKT]: Yes, sir.

7 MJ [COL HENLEY]: Assuming that the parties stipulated that Mr.
8 Jawad at the time the alleged offense was under 18 is there some
9 evidence before the commission as to the apparent requirement there
10 be some operation in structure an organized structure rather than
11 just one person as referenced by the professor? Not aware of any
12 evidence presented on that latter point.

13 DC [MAJ FRAKT]: Nor am I Your Honor I was, my understanding is
14 simply that we are dealing with anyone who is captured as a juvenile
15 and treated as an enemy combatant that's what I am talking about, but
16 I would note that the government has alleged that Mr. Jawad was part
17 of a group so I'm----

18 MJ [COL HENLEY]: I'm not trying to mislead you which is why I
19 asked the question how do you define child soldier. Does your brief
20 define it for the commission or do you just simply use the term child
21 soldier?

22 DC [MAJ FRAKT]: I'm simply talking about age that the
23 commission that there is no evidence of a congressional intent to try

1 minors to try children under the age of 18, whether they be labeled
2 child soldiers or something else. At this point I can't exactly
3 recall what I put in all my briefs, but----

4 MJ [COL HENLEY]: Okay. Now you can proceed.

5 DC [MAJ FRAKT]: The child soldier or the juvenile, the
6 treatment of a juvenile combatant if the court believed that it were
7 possible to assert jurisdiction over a juvenile. Special procedures
8 would have to be in place none of which are in place, so that at the
9 very least would call for an abatement to allow the Secretary of
10 Defense to create additional implementing regulations to come into
11 compliance with our international obligations under the optional
12 protocol for the involvement of children of armed conflict. I think
13 it would be the best source to look at if one were trying to take
14 judicial notice of law of the status of children involved in armed
15 conflict in the optional protocol, so that's one point.

16 Mohammed Jawad was captured, accused of an act, a hostile
17 act and treated and immediately taken into custody, put in a Prison
18 Camp in Bagram Prison and then transferred 49 days later to
19 Guantánamo.

20 By any traditional, normal definition he is a prisoner of
21 war. The mere fact that the president wrongfully and illegally
22 included that the Geneva Conventions didn't apply and that he was not
23 to be treated as a prisoner of war does not actually deny him the

1 status of prisoner of war. Those decisions have found to be in error
2 even though the government has not actually given proper redress to
3 those people who were denied those rights.

4 He is entitled; he is presumed a lawful combatant until
5 proven otherwise. No hearing of any kind competent or otherwise has
6 been held to determine if he is a lawful or unlawful combatant and
7 the burden is clearly on the government to prove that he is not. It
8 can't be done by you. It can't be done by military commission, which
9 requires, it requires three members and it requires when, when
10 possible to be done prior to trial, prior to a criminal proceeding.
11 And then must be reconfirmed in the criminal proceeding.

12 I don't know why the defense counsel didn't raise this
13 issue in Hamdan. I don't know why they didn't raise it in Khadr, but
14 their failure to raise it doesn't preclude us from raising it.
15 Jurisdictional--and clearly, Judge Allred's decision which seems to
16 be relevant was in error. He conflated Article 5 in Article 45, he
17 misquoted he took things in out of context. He accepted a waiver, an
18 invalid waiver when the defense said he could do it when he couldn't.

19 So we are not bound by any of that, certainly this
20 commission is not bound by any of that. This commission is bound to
21 follow international law, the law of war, all the statutory guidance,
22 the Geneva Conventions, which will tell you that you do not, while
23 you may have jurisdiction to determine your jurisdiction and that

1 includes a determination that you do not have jurisdiction. It
2 doesn't mean you must automatically conclude that you do have
3 jurisdiction. The whole point of having jurisdiction to determine
4 your own jurisdiction means that sometimes you decide you know what I
5 don't have it.

6 Here the government has the burden of proving that you do
7 have it, they willfully failed to do that. But even if you did
8 theoretically could have jurisdiction over some crimes even though
9 there had been no Article 45 tribunal, there had been no Article 5
10 tribunal. There had been no treatment as a POW. It would have to be
11 a law of war violation. Attempted murder in violation of the law of
12 war could theoretically be a law of war violation, but there are
13 specific requirements under the law of war that makes something an
14 international war crime rather than a domestic crime.

15 An act of violence, attempted murder is a domestic crime;
16 it only is converted into a war crime if certain conditions are met.
17 In the context of an armed conflict and in violation of the law of
18 armed conflict that is the principles of the law of armed conflict,
19 the use of an illegal weapon, an illegal means, an illegal method.

20 Now perfidy, which is not charged in this case, which is a
21 separate crime under the MCA theoretically could potentially,
22 possibly be a basis for a murder in the violation of the law of war.
23 If for example someone held up a white flag to surrender and the

1 other, the enemy came out to take them prisoner war and they pulled
2 out their gun and shot that person. No problem. That's not what
3 happened here. I don't know where this hypothetical came from of
4 waving hello because all of the evidence I have seen is that the
5 people in the jeep never even saw the alleged assailant. But even if
6 they had, they were driving through this crowded bazaar whether
7 Mohammed Jawad was there or not and he didn't lure them there, he
8 didn't lull them into any false sense of safety or complacency. He
9 didn't play being a civilian; he was a civilian so----

10 MJ [COL HENLEY]: How does the commission know that?

11 DC [MAJ FRAKT]: We'll it's the government's obligation to
12 present evidence in support of the theory that he could----

13 MJ [COL HENLEY]: You're asking the court make a finding of fact
14 as to what happened.

15 DC [MAJ FRAKT]: I'm asking the court, the defense filed a
16 motion saying that jurisdiction did not exist----

17 MJ [COL HENLEY]: You just argued----

18 DC [MAJ FRAKT]: ----the government has a burden----

19 MJ [COL HENLEY]: ----Major Frakt you just argued that's not
20 what happened in this case----

21 DC [MAJ FRAKT]: ----I take it Your Honor----

22 MJ [COL HENLEY]: ----how does the commission know what happened
23 neither side presented any evidence as to the events.

1 DC [MAJ FRAKT]: ----will that's not completely true Your Honor,
2 I have stated facts and every one of my briefs none of which have
3 been contradicted by the government and they have not put on any and
4 so under the military commissions rules that is a concession of those
5 facts----

6 MJ [COL HENLEY]: So help the commission identify what facts
7 you're relying upon support to your argument "that's what happened".

8 DC [MAJ FRAKT]: Well what I can tell you Your Honor is that
9 there is no facts in any motion filed by anyone that suggests that
10 anyone waved and said hello to anyone. Of course that was offered as
11 a hypothetical, but the facts that have been presented are that a
12 hand grenade was thrown into a passing jeep.

13 Two soldiers were injured, one Afghan interpreter was
14 injured that's all the facts that you have ever been presented. And
15 it's not the defense's burden to--oh the was also an allegation that
16 of involvement in the group HIG, which is really has no relevance one
17 way or the other.

18 But it's the government's burden to prove that jurisdiction
19 exists. It's not the defense's burden to prove that jurisdiction
20 does not exist. They have had ample opportunity to provide evidence
21 to the court that would enable the court to determine that it has
22 jurisdiction. No such evidence was offered because no such evidence
23 exists. They just, all we have from the facts that you have been

1 presented albeit limited is an isolated act of a hand grenade being
2 thrown. The weapon has been agreed upon. The result has been agreed
3 upon. It's not agreed that Mohammed Jawad threw it, but assuming
4 that he did. It's still not a violation of the law of war.

5 I mean this is a case of the government failing to produce
6 any evidence that would enable you to uphold their view of the law.
7 Something more than a bare allegation really all you actually have
8 and all we have is what's in the charge. And what's in the charge is
9 on "x" day, 17 December 2002, Mohammed Jawad through a hand grenade
10 into a vehicle, attempting to kill these people. That's all you
11 have. That's not enough.

12 There's nothing in there that suggests violation of the law
13 of war. If we applied Judge Allred's instruction which is correct
14 presentation of the law, it's also the same definition that's in the
15 war crimes act that's what you're left with. It's an ineluctable,
16 inescapable conclusion. That there is no jurisdiction, thank you.

17 MJ [COL HENLEY]: Thank you counsel.

18 TC [LTC VANDEVELD]: Your Honor, I was a little confused about
19 the order of presentation, but with respect to the motion to dismiss
20 for lack of personal jurisdiction on the grounds that the accused was
21 a child soldier. I looked at his brief there is no definition, the
22 fact he is 23 years old right now. He is being tried for acts that
23 may or may not have the occurred at the time that he was either 17,

1 16, or 18. The evidence is can be taken anyone of those ways. And
2 we obviously at trial are going to urge that he was close to 18, if
3 not 18.

4 The reliance on the optional protocol makes no difference
5 whatsoever. It's not the law of land. It was rejected by President
6 Reagan, was never ratified by the Senate and was never obviously;
7 maybe it was ratified by the Senate but never signed by President
8 Reagan. So the policy statements have certainly don't surmount the
9 congressional intent in acting the MCA.

10 Khadr had been charged in the pre-MCA proceedings so
11 Congress can be presumed to know what Khadr's age was or alleged to
12 have been at the time that had enacted the MCA. The court should
13 defer to Congress in enacting the MCA, which doesn't contain a lower
14 limit for prosecuting individuals or an upper limit it doesn't say
15 that somebody at 72 can't be prosecuted under the MCA. So in the
16 absence of any guidance on that from Congress, the court should,
17 there is no basis for the court's ruling at all.

18 Secondly with respect to the motion to dismiss on the basis
19 of the lack of subject matter jurisdiction, which is largely found in
20 Professor Morris's testimony today. She admitted although not as
21 clearly as we would have liked her to that there are different views
22 on what the laws of war are. The law of war is an element of the
23 offense in this case as is the accused alien unlawful enemy combatant

1 status. So we didn't present evidence in these motions because it's
2 really question for the prior fact, which in this case will be the
3 commission panel, if we get that far.

4 MJ [COL HENLEY]: Is it the government's position that any act
5 committed by an alien unlawful enemy combatant is a law of war
6 violation?

7 TC [LTC VANDEVELD]: Absolutely not sir, but I would refer to
8 the court again to the Military Commissions Act, which distinguishes
9 between what Professor Morris urged on the stand today and that is
10 that act has to be committed against a protected person or by using a
11 method, say an unlawful weapon, which is a distinct offense under the
12 MCA versus what Mr. Jawad is charged with, which is attempted murder
13 in violation of the law of war. I think the Paragraphs are 5 and 28,

14 So if you adopt Professor Morris' view of the MCA you would
15 in effect moot one section of the law in the MCA and that certainly
16 doesn't comport with the Charming Betsy Cannon.

17 MJ [COL HENLEY]: So you intend to present evidence other than
18 Mr. Jawad's status as an alien unlawful enemy combatant to establish
19 whether the specific act charged would be a law of war or in
20 violation of the law of war?

21 TC [LTC VANDEVELD]: That's correct under the section that we've
22 charged and just as a matter of proffer we are going to prove that he
23 was a member of Hekmatyar, I'm sorry, Gulbuddin, HIG. He trained at

1 a HIG training camp on the use of grenades. He blended into the
2 civilian population dressed as a civilian. He gained the confidence
3 of those passing by. He allowed Turkish soldiers to go by. He
4 allowed German soldiers to go by. And then he specifically targeted
5 Americans and it's those means and those elements under the section
6 and paragraph that he has been charged that we intend to prove that
7 trial and not in a motion status. So it's not for the--with respect
8 it is not for the Military Judge to decide. It's for the commission
9 to decide based on the evidence that we present at the time.

10 MJ [COL HENLEY]: So you concede that establishing a status as
11 an alien unlawful enemy combatant and that alone would be
12 insufficient to obtain a conviction on the charge and specifications?

13 TC [LTC VANDEVELD]: I don't want to concede that but I have no
14 argument to the contrary.

15 MJ [COL HENLEY]: And that appears to be contrary to as I
16 understand the position taken by trial counsel in the Hamdan case,
17 correct?

18 TC [LTC VANDEVELD]: That maybe the case Your Honor, but we do
19 have evidence that does meet what we believe to be the definition of
20 the law of war. So we are not saying because they have taken a
21 position in a different case and certainly we disagree with
22 instruction given in Hamdan. We think we have evidence to prove our
23 charge and we ask we be allowed to do that. And if expert testimony

1 becomes necessary to establish what the law of war is will also call
2 on our expert witness----

3 MJ [COL HENLEY]: Right.

4 TC [LTC VANDEVELD]: ----to testify.

5 MJ [COL HENLEY]: I understand the government's position that
6 the fact finder generally will be the commission. I understand that.
7 Anything further?

8 TC [LTC VANDEVELD]: That's it.

9 MJ [COL HENLEY]: Do you have a brief follow-up Major Frakt.

10 DC [MAJ FRAKT]: Very brief. I believe that trial counsel
11 referred to the optional protocol as not having been ratified. It
12 was the additional protocol that was not ratified, that's the
13 additional protocol of Geneva Conventions. The optional protocol
14 that I was referring to is optional protocol of the involvement of
15 children in armed conflict, which has been ratified. As far as the
16 government's recently announced plan to present evidence at a future
17 time, it seems to us, the defense that this matter is now closed. It
18 has been briefed, evidence has been presented, it's been argued, they
19 haven't presented any evidence, they didn't choose to call an expert,
20 to say that we are going to do that later is just too little too
21 late. So you have what you have and you have more than enough to
22 rule that there is no jurisdiction. Thank you.

1 MJ [COL HENLEY]: Thank you counsel. I will take the matter
2 under advisement. Did you want to proceed with additional argument
3 on 04 this evening or wait until tomorrow morning?

4 DC [MAJ FRAKT]: We have one other bit of evidence on 04. We
5 have an oral stipulation of expectant testimony of Colonel Morris
6 that was worked out over the break so he won't have to testify since
7 he is involved in the Khadr matter today. May I read that to the
8 court? It's fairly brief.

9 TC [LTC VANDEVELD]: Your Honor, excuse me, we don't have any
10 objection to his presenting this as a defense exhibit rather than
11 read it.

12 DC [MAJ FRAKT]: Well I would like to publish it by reading it
13 so that Mr. Jawad can hear the benefit of the translation.

14 MJ [COL HENLEY]: Proceed.

15 DC [MAJ FRAKT]: It is hereby agreed by the prosecution and
16 defense that if Colonel Lawrence Morris were called to testify, he
17 would testify substantially as follows.

18 I am Colonel Lawrence Morris, Chief Prosecutor Office of
19 Military Commissions. I assumed my current position in November
20 2007. I detailed myself to the Jawad case for the purpose of arguing
21 the unlawful influence motion D004 and handling the witnesses related
22 to that motion including Brigadier General Hartmann, the Legal
23 Adviser.

1 On June 18, 2008, the day prior to the hearing at which
2 Brigadier General Hartmann was to testify. I was notified by
3 Lieutenant D. of the JTF GTMO.

4 MJ [COL HENLEY]: Slow down.

5 DC [MAJ FRAKT]: Yes, sir.

6 MJ [COL HENLEY]: The translation.

7 DC [MAJ FRAKT]: I was notified by Lieutenant D. of the JTF
8 Guantánamo, Staff Judge Advocate Office that if Brigadier General
9 Hartmann were to testify in a manner that Captain McCarthy, the Joint
10 Task Force Staff Judge Advocate, believed to be untruthful that
11 Captain McCarthy would feel obligated to come forward, as an officer
12 of the court and offer to testify as a rebuttal witness for the
13 defense. Captain McCarthy followed this up with an email message to
14 me on this subject. I have deleted the message and do not know how
15 to retrieve it. From what I remember of the message, it said
16 essentially the same thing that Lieutenant D had already told me.

17 It had not occurred to me that I had any obligation to
18 inform the defense of this communication. I assumed that Captain
19 McCarthy was just giving me fair warning and was already in contact
20 with the defense.

21 During the cross examination of Brigadier General Hartmann
22 by Major Frakt, he was asked, he General Hartmann, was asked if there

1 had been monthly video teleconferences with senior leaders of JTF
2 Guantanamo and SOUTHCOM. Brigadier Hartmann answered no.

3 I was aware that there had been meetings between Brigadier
4 General Hartmann and senior leaders of Joint Task Force Guantánamo
5 and SOUTHCOM. I did not feel that I had any obligation to correct
6 the record because in my view Brigadier General Hartmann's testimony
7 had been technically accurate. I did not consider his testimony to
8 be misleading. I considered it to be the role of the defense counsel
9 to follow-up with additional cross-examination questions, if he
10 thought the testimony was misleading.

11 MJ [COL HENLEY]: Thank you counsel. Is that it for the evening
12 defense?

13 TC [LTC STEVENSON]: Can I?

14 MJ [COL HENLEY]: You had something trial counsel?

15 TC [LTC STEVENSON]: Yes, sir. Just one thing briefly in the
16 interchange just a moment ago with you, I just to discuss this with
17 lead counsel. I just want to make clear regarding what the
18 government's position is on the jurisdictional matter. The
19 government position is that it would be a violation of the law of war
20 for an unlawful enemy combatant to attempt to murder, to attempt to
21 murder lawful combatants.

22 But, that the facts of this case, we have that scenario,
23 but we have as you saw argued much, much more in this case to go

1 beyond that. So you ask are you conceding the position in hand
2 basically that, unlawful enemy combatants committing, a particular
3 act, attempted murder against a lawful combatant would that alone be
4 a violation of the law of war. Our position is yes that would.

5 However, this case the way it will play out to the fact
6 finder and you have heard some of it already, although you haven't
7 seen all of the evidence. We'll play out a lot more facts of
8 circumstances to show that it goes beyond just a mere status as the
9 basis of the charge.

10 MJ [COL HENLEY]: So you are not mislead as for that first point
11 whether or not you concede that's the issue I raised. Status alone
12 would be insufficient to establish violation of the law of war. If
13 you intend to rely in whole or in part on that, then that issue
14 should and will be addressed before we begin the trial, if we ever
15 get that far.

16 TC [LTC STEVENSON]: Yes, sir.

17 MJ [COL HENLEY]: Are you clear?

18 TC [LTC STEVENSON]: We are clear on that.

19 MJ [COL HENLEY]: It is incorporated I believe in the subject
20 matter jurisdiction motion that's why I asked it.

21 TC [LTC STEVENSON]: Right. And that's our position, sir.

22 MJ [COL HENLEY]: Major Frakt?

1 DC [MAJ FRAKT]: Well I would concur that that has been the
2 government's position all along. That unprivileged belligerency
3 alone, status alone is enough and that this is a new argument that
4 they are crafting today, not that they couldn't create a new
5 argument, but they haven't actually offered any evidence to support
6 that.

7 MJ [COL HENLEY]: Well it should be clear now that, the court,
8 the commission is not joined in that position.

9 DC [MAJ FRAKT]: Crystal Your Honor. Did the court want to hear
10 argument on D004, because we don't--now that we have done that
11 stipulation we don't have any additional evidence on D004.

12 TC [LTC VANDEVELD]: We would submit on briefs and prior
13 argument.

14 MJ [COL HENLEY]: Did you have additional argument you wanted to
15 offer beyond that contained in your previous briefs at least as to
16 the significance of the new evidence?

17 DC [MAJ FRAKT]: Right just focus on the new evidence, yes.

18 MJ [COL HENLEY]: Okay, you may proceed.

19 DC [MAJ FRAKT]: Thank you. As the defense has previously
20 argued the only reason that the charges were brought against Mr.
21 Jawad was because of the intense interest of General Hartmann. What
22 we've seen is that General Hartmann's unlawful influence extended
23 well beyond the time of the--actually the decision to swear the

1 charges and has continued really up to the present. Of particular
2 significance is General Hartmann's chart, which I have blown up, not
3 actually blown up but enlarged if you will. I know I need to be near
4 a microphone. Mohammed Jawad gets a special line on General
5 Hartmann's chart. This--may I approach?

6 MJ [COL HENLEY]: Is this an exhibit?

7 DC [MAJ FRAKT]: Yes, Your Honor. This chart was this chart the
8 black and white version has been attached as an exhibit to a previous
9 defense filing. It was a supplement to D004; it was called the 1
10 November 2007 timeline. And so it consists of five sheets, which I
11 had to spread out and tape together to get the full impact of it.
12 But you can see that there is a separate line dedicated to Mohammed
13 Jawad on this chart. And on the chart it indicates that referral is
14 planned for January and that it will go to trial.

15 Now this is a product that General Hartmann acknowledged
16 that he created, or was created at his direction in early November
17 2007, well before the charges against Mohammed Jawad were referred.
18 It is very clear that he intended all along for the charges against
19 Mohammed Jawad to be referred and to proceed to trial. That is not
20 the action of an independent neutral legal advisor. And indeed the
21 remainder of the chart makes clear that virtually everything that
22 happened has happened according to General Hartmann's master plan.

1 We've heard from General Zanetti that he had taken over the
2 entire process, he knew who was going to be charged in advance. You
3 look at the red lines on the chart those are the high value
4 detainees. He knows when the 9/11 people are going to be charged.
5 He predicted February 4 - 8, it turned out to be February 11, the
6 following Monday. He holds a meeting, a secured Video Teleconference
7 with the generals; he kicks out the colonels, kicks out the lawyers.
8 Tells them next we are going to prefer charges against 9/11 guys. It
9 is going to be a joint trial of six, it is right there on the chart.
10 And it is going to go to trial a few months later.

11 No consideration that maybe it won't get referred. He then
12 holds a press conference the day that the charges were sworn. And
13 says that we just received these charges here at the Convening
14 Authorities office, we are going to take a look at them now and we
15 are going to give you a--and we will take it under advisement and we
16 will study them and review. And I will make an independent
17 recommendation and the convening authority will make an independent
18 decision.

19 So they are presenting an appearance to the world of a
20 regularly constituted court of a normal process, but in fact that is
21 not what was happening at all, the decisions were preordained. The
22 decisions had been made by him well in advance. He was calling the
23 shots. He even went so far as to say in numerous press conferences,

1 when asked well how long will these reviews take? When do you expect
2 charges to be referred? He would say well there is no timeline, we
3 don't have a schedule. But he did have a timeline that hung on his
4 wall in his office and was regularly updated according to his own
5 affidavit.

6 So he lied in this courtroom as we have heard. Colonel
7 Morris knew about it. He knew that he had just misspoken, he didn't
8 correct it. Why not? Luck of ethics? Fear of correcting General
9 Hartmann. Does he know what--probably seen what happens when people
10 try to cross General Hartmann? General Hartmann chewed out every
11 single person that he came in contact with apparently including other
12 general officers. Everyone that has described him has said that I
13 have never seen anything like it. I have never seen someone so
14 unprofessional; this curse word laden unprofessional, bullying
15 tactics have driven this process and have resulted in cases, which
16 have no place in a war crimes tribunal arriving here.

17 When you look at the state of the discovery process you
18 can--it is very clear that the government was not prepared when they
19 swore these charges. They didn't have the evidence together. They
20 didn't have the permission from the other government agencies to turn
21 over things. But he pushed it, it's what he wanted, he wanted three
22 cases per month, this was going to be the first and that's what
23 happened. Then we know about his pretrial advice and how effective

1 that was. And then he has the gall the unmitigated temerity to come
2 in here and fudge, which the defense suspected at the time and now
3 has proven beyond any shadow of a doubt.

4 General Zanetti said he was in shock when he heard him say
5 that there were no monthly meetings, because there was only one in
6 February, March and April, there hadn't been one in May. That's
7 Colonel Morris' excuse for not bothering to correct him, because
8 technically there hadn't been monthly meetings. It's a very sad day
9 when the legal advisor to the Convening Authority the most senior
10 attorney, a person with a heightened duty of candor to the tribunal
11 takes that kind of a position here in this courtroom. Which is
12 endorsed, wholly by the Chief Prosecutor the other senior most
13 attorney, an officer involved in this. It saddens me; it disappoints
14 the defense, peoples lives are at stake here. We have a juvenile and
15 even though the government knows well, they sat we are not sure how
16 old he was.

17 The U.S. has conceded through the state department, to the
18 United Nations that Mohammed Jawad was a juvenile. And they keep
19 trying to say well we are not so sure. Someone is facing life in
20 prison and the senior lawyers and the senior officers are playing
21 fast and loose with the facts. It's just a travesty. And this court
22 has the authority to dismiss charges for unlawful influence.
23 Certainly the court, the commission has the authority to require a

1 new pretrial advice at a minimum and go back and get a real legal
2 adviser, an independent legal adviser.

3 It's pretty clear, or it should be clear that General
4 Hartmann cannot survive and cannot remain a part of this process. So
5 I'm confident that there will be a new legal advisor in place very
6 soon. So if the commission is not prepared to take the drastic steps
7 of dismissal then consider the other option of dismissal without
8 prejudice and said back for a fresh look. Thank you.

9 MJ [COL HENLEY]: Thank you counsel. It is my understanding
10 that tomorrows witness is video teleconference set for 0830, is that
11 correct?

12 DC [MAJ FRAKT]: Your Honor the window of availability is 8 to
13 11. We can start whenever you prefer.

14 MJ [COL HENLEY]: We will reconvene tomorrow at 9 a.m. until
15 then the commission is in recess.

16 [The commission recessed at 1750, 13 August 2008.]

17 [The commission was called to order at 0902, 14 August 2008.]

18 MJ [COL HENLEY]: The commission is called to order. All parties
19 present before the recess are again present. Mr. Jawad can you hear
20 me?

21 ACC [MR. JAWAD]: Yes.

22 MJ [COL HENLEY]: Major Frakt can you call your next witness
23 please.

1 DC [MAJ FRAKT]: Yes, yes sir we do have a witness as you can
2 see ready to go in the video teleconference. There was one issue I
3 wanted to just bring up briefly and since you now heard the testimony
4 of our expert. I presumably determine that was relevant and material
5 we want to renew our request that she be appointed as, a government
6 appointed defense expert witness so that she can be compensated.

7 MJ [COL HENLEY]: My recollection is during her testimony, I
8 found her to be an expert.

9 DC [MAJ FRAKT]: I believe it would be helpful to direct the
10 convening authority that she be provided reasonable and adequate
11 compensation for her efforts.

12 MJ [COL HENLEY]: I am not going to direct the convening
13 authority to pay her anything. You can certainly submit the request
14 and indicate that the Court qualified her as an expert.

15 DC [MAJ FRAKT]: Your Honor I did submit two correct requests.
16 The convening authority specifically said that her testimony would
17 not be admissible or relevant in any military commission proceeding
18 of any kind and therefore they would not pay her.

19 MJ [COL HENLEY]: The circumstances seem to have changed Major
20 Frakt.

21 DC [MAJ FRAKT]: I agree.

22 MJ [COL HENLEY]: You called her as a witness.

23 DC [MAJ FRAKT]: Yes.

1 MJ [COL HENLEY]: I accepted her as an expert, she testified.

2 DC [MAJ FRAKT]: Well let me put it another way, sir, Your
3 Honor, if I submit another request to the convening authority and she
4 denies our request will you agree to take it up one more time the
5 issue?

6 MJ [COL HENLEY]: We can certainly take it up.

7 DC [MAJ FRAKT]: Thank you Your Honor.

8 DC [LCDR DOXAKIS]: Your Honor, the defense calls Special Agent
9 Angela Birt.

10 **ANGELA BIRT, Civilian, was called as a witness for the defense via**
11 **video teleconference, was sworn, and testified as follows:**

12 **DIRECT EXAMINATION**

13 **Questions by the defense counsel:**

14 Q [LCDR DOXAKIS]: Good afternoon Ms. Birt.

15 A [MS. BIRT]: Good afternoon, ma'am.

16 Q [LCDR DOXAKIS]: Can you see me?

17 A [MS. BIRT]: No ma'am I see a television screen with my own
18 image projected on it.

19 Q [LCDR DOXAKIS]: I believe they can, the video people can hear
20 us and they can--they have corrected that, can you see me now?

21 A [MS. BIRT]: Yes, ma'am I can.

22 Q [LCDR DOXAKIS]: Ms. Birt where are you currently located?

23 A [MS. BIRT]: I am currently at Joint Base Balad in Iraq.

1

2 Q [LCDR DOXAKIS]: And what is your position there?

3 A [MS. BIRT]: I'm an Internal Investigator for Kellogg, Brown
4 and Root.

5 Q [LCDR DOXAKIS]: And as Internal Investigator can you just
6 briefly tell us what your duties are?

7 A [MS. BIRT]: I work for the KBR, in the legal department and I
8 work investigations as assigned by the lawyers in that department.

9 Q [LCDR DOXAKIS]: And before your employment with KBR what were
10 you doing?

11 A [MS. BIRT]: I was U.S. Army Special Agent for about 18 years.

12 Q [LCDR DOXAKIS]: And prior to those 18 years as a Special
13 Agent with CID what were you doing?

14 A [MS. BIRT]: I was a Military Police Officer, Military
15 Intelligence person for five years.

16 Q [LCDR DOXAKIS]: Now in your position as a CID Agent were you
17 involved in an investigation in the summer of 2004?

18 A [MS. BIRT]: Yes, ma'am I was.

19 Q [LCDR DOXAKIS]: And can you tell us what that investigation
20 was in regard to?

21 TC [LTC VANDEVELD]: Your Honor, I do have an objection as to
22 relevance, 2004.

1 MJ [COL HENLEY]: Let's hear the testimony and then we can
2 return to your objection, you may proceed.

3 TC [LTC VANDEVELD]: Yes sir.

4 Q [LCDR DOXAKIS]: Ms. Birt can you answer the question please?

5 A [MS. BIRT]: Yes, ma'am I was assigned as a Task Force
6 Commander to investigate two homicides at the Bagram Control Point in
7 Afghanistan.

8 Q [LCDR DOXAKIS]: And as part of that investigation did you
9 interview a number of detainees at Guantánamo Bay Cuba?

10 A [MS. BIRT]: Yes, ma'am I did.

11 Q [LCDR DOXAKIS]: And why did you need to interview those
12 detainees at Guantánamo Bay?

13 A [MS. BIRT]: A significant amount of time had elapsed from the
14 time of the homicides to the initiation of the task force. A number
15 of personnel had rotated or been transferred and some of the
16 detainees who were in the facility at the time had since been moved
17 to Guantánamo Bay.

18 Q [LCDR DOXAKIS]: And what were with the names of the
19 individuals whose deaths you were investigating?

20 A [MS. BIRT]: One man's name was MuhulDAH Habibullah and the
21 other one's name; he went simply by one name Dilawar.

22 Q [LCDR DOXAKIS]: Now as part of the interviews that you did at
23 Guantánamo Bay, did you interview an individual named Mohammed Jawad?

1 A [MS. BIRT]: Yes, ma'am, I did.

2 Q [LCDR DOXAKIS]: Do you specifically remember that interview?

3 A [MS. BIRT]: I did after having read my report last week.

4 Q [LCDR DOXAKIS]: Is there anything about Mr. Jawad that you

5 recall that helps you to remember him?

6 A [MS. BIRT]: He was significantly younger than the other men

7 we spoke with and he was held in a separate portion at Guantánamo

8 Bay, a separate facility.

9 Q [LCDR DOXAKIS]: Than the other detainees that you spoke with?

10 A [MS. BIRT]: Yes, ma'am.

11 Q [LCDR DOXAKIS]: Do you know why you decided specifically to

12 interview Mr. Jawad?

13 A [MS. BIRT]: He was not on our list when we traveled down

14 there myself and my partner, however, after we arrived at Guantánamo

15 Bay some of our interviews lead us to additional detainees and

16 because the folks at Guantánamo----

17 [Lost VTC Connection, Technicians came to reconnect.]

18 [Witness stepped out of VTC to get technician.]

19 WIT [MS. BIRT]: I apologize ma'am that exceeded my technical

20 capabilities.

21 Q [LCDR DOXAKIS]: We got cut off in the middle of your answer

22 but I believe you were saying that you were led to Mr. Jawad through

23 your interviews with other detainees.

1 A [MS. BIRT]: Yes, ma'am some of the detainees were on our list
2 to start with and some of them led to additional folks.

3 Q [LCDR DOXAKIS]: What did Mr. Jawad tell you about his
4 experiences at Bagram?

5 A [MS. BIRT]: He didn't have any information relevant to the
6 deaths we were investigating, but he did talk about suffering similar
7 types of abuse that we had noted from other detainees and on the two
8 men that were deceased.

9 Q [LCDR DOXAKIS]: And specifically what types of abuse did he
10 note to you?

11 A [MS. BIRT]: Being forced to stand, being sleep deprived,
12 being hit, kicked, beaten.

13 Q [LCDR DOXAKIS]: Did he describe to you being shackled and
14 hooded?

15 A [MS. BIRT]: Yes, he did.

16 Q [LCDR DOXAKIS]: During your investigation was that something
17 that you encountered frequently, reports of being shackled and
18 hooded?

19 A [MS. BIRT]: Yes ma'am, shackling was quite common in that
20 facility as was hooding.

21 Q [LCDR DOXAKIS]: Can you describe for us what that means?

22 A [MS. BIRT]: There were a variety of configurations for
23 shackling individuals primarily hand irons, which are traditional

1 handcuffs we used, also leg irons. Often times there was a waist
2 chain used and the chain was run from the legs irons, to the hand
3 irons, through the belly chain as a form of restraint during
4 movement. And on several occasions we had discovered evidence that
5 the detainees were cuffed to objects: doors, ceilings, air locks
6 things of that nature.

7 Q [LCDR DOXAKIS]: And did Mr. Jawad actually report to you
8 being chained to the door of his isolation cell?

9 TC [LTC VANDEVELD]: Your Honor I know that this is a motion
10 hearing, but I would ask the commission to----

11 A [MS. BIRT]: Yes, ma'am.

12 TC [LTC VANDEVELD]: ----direct counsel not to ask leading
13 questions.

14 MJ [COL HENLEY]: Overruled.

15 TC [LTC VANDEVELD]: Yes sir.

16 Q [LCDR DOXAKIS]: The answer to that was yes?

17 A [MS. BIRT]: Yes ma'am.

18 Q [LCDR DOXAKIS]: And when you described to the shackling of
19 arms and legs was that done at the same time or at separate times?

20 A [MS. BIRT]: It varied depending on the circumstance and what
21 the guards were trying to achieve with the shackling.

22 Q [LCDR DOXAKIS]: You described kicking and hitting can you
23 tell us a little bit more about that?

1 A [MS. BIRT]: It has been my experience with talking with folks
2 from that theater that anytime they are touched with a foot or leg
3 they describe it as a kick. We were much more precise in the
4 homicide investigation because we were looking at a particular type
5 of blow that was delivered by the MPs, which was a knee to the thigh
6 area. So when he says kicked it could have been a number of things.

7 Q [LCDR DOXAKIS]: Was there--didn't Mr. Jawad report to you
8 that he was not allowed to speak during his time at Bagram?

9 A [MS. BIRT]: Yes, ma'am that is one of the rules at Bagram.

10 Q [LCDR DOXAKIS]: And what happened if someone did speak?

11 A [MS. BIRT]: They were generally segregated from the rest of
12 the population.

13 Q [LCDR DOXAKIS]: Was there any discussion of doctors between
14 you and Mr. Jawad and his medical care at Bagram?

15 A [MS. BIRT]: Yes, ma'am quite a bit.

16 Q [LCDR DOXAKIS]: Can you please describe that for us?

17 A [MS. BIRT]: He told us that during his capture or shortly
18 thereafter he had a broken nose that he suffered abuses at Bagram and
19 as a result he was, he asked to see the doctor and was taken to see
20 him for chest pain I believe and painful urination and that he had
21 made frequent, similar complaints while he was at Guantánamo Bay in
22 the facility there. But he told us that he didn't have a lot of
23 confidence in the doctors.

1 Q [LCDR DOXAKIS]: Did Mr. Jawad report to you hearing the cries
2 and screaming from other detainees?

3 A [MS. BIRT]: Yes he did, yes ma'am.

4 Q [LCDR DOXAKIS]: Can you explain that to us what that would
5 mean?

6 A [MS. BIRT]: That was a fairly common finding with most of the
7 detainees. The facility at Bagram had two floors one of them housed
8 the general population and the second floor housed the interrogation
9 booths and isolation cells. And there were often several detainees
10 to include Mr. Jawad told us that they had heard other detainees
11 crying for their parents, begging for the beatings to stop things of
12 that nature.

13 Q [LCDR DOXAKIS]: Now you mentioned that there is two floors in
14 the facility an upper floor that contained the isolation booths and a
15 lower floor that contained the general population correct?

16 A [MS. BIRT]: Yes, ma'am.

17 Q [LCDR DOXAKIS]: Can you explain the procedure that was used
18 for detainees going up and down the stairs?

19 A [MS. BIRT]: When the detainee needed to be moved for security
20 reasons the guards did not want them to know the layout of the
21 facility, so they were hooded, shackled, and handcuffed for movement
22 up the stairwell.

23 Q [LCDR DOXAKIS]: And where were the bathrooms located?

1 A [MS. BIRT]: Downstairs.

2 Q [LCDR DOXAKIS]: So is it fair to say that a detainee who was
3 in isolation would have to go up and down the stairs to get to the
4 bathroom?

5 A [MS. BIRT]: Yes, ma'am they would.

6 Q [LCDR DOXAKIS]: And what did Mr. Jawad report to you about
7 his experience on those stairs?

8 A [MS. BIRT]: He reported being pushed down the stairs by the
9 MP guards.

10 Q [LCDR DOXAKIS]: Did you show Mr. Jawad some photographs of
11 some personnel who had been guards at Guantánamo--or at Bagram?

12 A [MS. BIRT]: Yes, ma'am we showed several photo arrays
13 containing photographs of the military police that were the guards at
14 the facility and also the military intelligence interrogators who
15 worked at the facility at the time.

16 Q [LCDR DOXAKIS]: And was Mr. Jawad able to identify any of
17 those individuals?

18 A [MS. BIRT]: Yes he was.

19 Q [LCDR DOXAKIS]: And did he describe to you some specific
20 behaviors that those individuals, some specific abuse from each
21 individual?

22 A [MS. BIRT]: Some individuals he attributed some abuse to in
23 particular one MP who he recognized as being the man who was

1 escorting him when he was pushed down the stairs. He said that the
2 man, he didn't see him at the time, but when they got to the bathroom
3 he took off his hood and that's when he observed him and recognized
4 him and that man he pointed out. The remainder of the individuals
5 that he pointed out he had some vague recollection of and he
6 characterized them as either good or bad people, but not a lot of
7 specific recollections on all of them.

8 Q [LCDR DOXAKIS]: Was anything that Mr. Jawad told you
9 inconsistent with what you have heard from other detainees?

10 A [MS. BIRT]: No ma'am.

11 Q [LCDR DOXAKIS]: Now as part of your investigation did you
12 actually go to Bagram and go to the facility there?

13 A [MS. BIRT]: Yes, ma'am in November 2003, myself and my
14 partner visited the facility.

15 Q [LCDR DOXAKIS]: And what was your purpose of that visit to
16 the facility?

17 A [MS. BIRT]: Well there were a number of purposes but
18 primarily to orient ourselves to the situation and the circumstances
19 because oftentimes people were describing things we could not
20 envision. We needed to sketch it, we needed to photograph it and the
21 portions that we could because it is a secure facility and we needed
22 to look for records that were kept in the facility that we did not
23 have.

1 Q [LCDR DOXAKIS]: And in regard to those records were you able
2 to discover anything?

3 A [MS. BIRT]: We did get some records on the two men who
4 ultimately died, we got their interrogations records and some of
5 their--the records that were kept for their capture, but nothing
6 regarding this particular gentlemen Mr. Jawad.

7 Q [LCDR DOXAKIS]: And did you look for records regarding Mr.
8 Jawad?

9 A [MS. BIRT]: No ma'am we didn't know about him at the time.

10 Q [LCDR DOXAKIS]: With your understanding of the records that
11 are kept do you believe there may be records regarding Mr. Jawad?

12 A [MS. BIRT]: No ma'am, we experienced a lot of disappointment
13 in that arena. There were several log books kept by the MPs which
14 were destroyed when the MP unit rotated and the SIPRNET computer they
15 maintained was also wiped and the new unit was using a different
16 system.

17 Q [LCDR DOXAKIS]: Now what was the period of time that your
18 investigation covered, for example, did you focus on a particular
19 time frame at Bagram?

20 A [MS. BIRT]: Yes, ma'am, the deaths occurred at the end of
21 November and the first week of December of 2002 and that was the
22 primary time frame we were trying to locate folks who were at the
23 facility at that time.

1 Q [LCDR DOXAKIS]: And did you discovery anything about the
2 particular units that were assignment to the facility at that time?

3 A [MS. BIRT]: Yes, ma'am, the 377th Military Police Company was
4 Indiana and it was a National Guard Reserve Company. They were
5 supposed to be running the control point and also the intra-control
6 points on the Bagram Air Base. The JIDK was run by some military
7 intelligence soldiers from Fort Bragg.

8 Q [LCDR DOXAKIS]: And what did your investigation reveal about
9 these two units?

10 A [MS. BIRT]: They had a relationship that the Military
11 Intelligence Interrogators would give instructions to the military
12 police and the military police would carry out portions of treatment
13 absent the interrogators presence. Specifically with regard to sleep
14 adjustment or sleep deprivation.

15 Q [LCDR DOXAKIS]: And did you discover any connection between
16 the allegations of abuse at Bagram and these particular units?

17 A [MS. BIRT]: Yes, ma'am, a number of soldiers were charged and
18 several court-martials were conducted as a result of the
19 investigations.

20 Q [LCDR DOXAKIS]: Did you find that there was a particular time
21 frame that these units were assigned to Bagram?

1 A [MS. BIRT]: Yes, ma'am, they were--they arrived shortly
2 before the deaths occurred and they left six months later. It was
3 like Fall to the following Spring.

4 Q [LCDR DOXAKIS]: Did your--what did your--did your
5 investigation discover anything about the amount of abuse happening
6 during that period as compared to other periods at Bagram?

7 A [MS. BIRT]: We didn't have any reoccurrences after that unit
8 left, those units rotated out.

9 Q [LCDR DOXAKIS]: Is it your belief that this was probably the
10 worst phase of abuse happening at Bagram?

11 A [MS. BIRT]: I don't know if I am qualified to say, I didn't
12 examine the other phases, it was the worst that I had ever seen.

13 Q [LCDR DOXAKIS]: What makes you say that?

14 A [MS. BIRT]: Just because I have been a police officer for so
15 long and generally people in handcuffs are not struck. That's not
16 allowed.

17 Q [LCDR DOXAKIS]: Did that trouble you?

18 TC [LTC VANDEVELD]: Your Honor----

19 A [MS. BIRT]: Yes, ma'am, it's doctrinally incorrect.

20 DC [LCDR DOXAKIS]: I'm sorry can you hold on one second please.

21 MJ [COL HENLEY]: Sustained.

22 Q [LCDR DOXAKIS]: Okay. We are going to move on to another

1 question. Now you mentioned earlier that there were some
2 prosecutions that came out this investigation?

3 A [MS. BIRT]: Yes, ma'am.

4 Q [LCDR DOXAKIS]: And were you involved in those prosecutions
5 in anyway?

6 A [MS. BIRT]: Yes, ma'am, I testified in a number of them.

7 Q [LCDR DOXAKIS]: And what was the result of your
8 investigation, did you make a determination as to how Mr. Dilawar and
9 Habibullah died?

10 TC [LTC VANDEVELD]: I do have to object on grounds to relevance
11 to this case, Your Honor.

12 MJ [COL HENLEY]: Sustained.

13 Q [LCDR DOXAKIS]: Was any--during the prosecutions for these
14 offenses are you aware of the outcomes of the prosecutions?

15 A [MS. BIRT]: Yes, ma'am.

16 Q [LCDR DOXAKIS]: And what outcomes are you aware of?

17 A [MS. BIRT]: There were several plea agreements for
18 individuals and there were a couple of convictions for maiming and
19 obstruction of justice, and assault.

20 Q [LCDR DOXAKIS]: In your opinion were the allegations of the
21 investigations substantiated?

22 A [MS. BIRT]: Our legal adviser for the Task Force concluded
23 that we had reached probable cause and the judge and the jury in the

1 cases that we had tried also concluded that we had reached a
2 reasonable degree of certainty to provide us with convictions, yes,
3 ma'am.

4 Q [LCDR DOXAKIS]: Now Mr. Jawad indicated to you that he was
5 interrogated while he was at Bagram, correct?

6 A [MS. BIRT]: Yes, ma'am, a number of times.

7 Q [LCDR DOXAKIS]: And did he also indicate to you that he was
8 beat and kicked by the MPs?

9 TC [LTC VANDEVELD]: I was just going to ask an answer I'm sorry
10 to interject.

11 A [MS. BIRT]: Yes, ma'am.

12 MJ [COL HENLEY]: Overruled.

13 Q [LCDR DOXAKIS]: In your experience as an MP and an
14 investigator is there anything that you found troubling about the
15 actions of the MPs in that particular situation?

16 A [MS. BIRT]: The military police were acting as an agent of
17 the military interrogators. They were charged with keeping up the
18 course of sleep deprivation and to that extent when the individual
19 would lie down or sit down, the MPs would go into the cell and
20 physically force them to stand.

21 Q [LCDR DOXAKIS]: Now you were on active duty when you
22 conducted these investigations, correct?

23 A [MS. BIRT]: Yes, ma'am, I was.

1 Q [LCDR DOXAKIS]: And you are no longer on active duty, can you
2 let us know why that is?

3 A [MS. BIRT]: I left the military in August of 2007, during--at
4 which time I retired, I was semiretired.

5 Q [LCDR DOXAKIS]: And did you voluntarily make the choice to
6 retire?

7 A [MS. BIRT]: Yes, ma'am.

8 Q [LCDR DOXAKIS]: And was that decision based partly on what
9 you observed in these cases?

10 TC [LTC VANDEVELD]: Your Honor, her reasons for retirement are
11 not relevant.

12 MJ [COL HENLEY]: Sustained.

13 Q [LCDR DOXAKIS]: Ms. Birt I don't have any further questions
14 for you. I'm going to let the prosecutor see if he has any questions
15 for you, okay.

16 WIT [MS. BIRT]: Yes, ma'am.

17 MJ [COL HENLEY]: Any cross examination. We need to take a
18 recess. I'm asking my security specialist. We need to take a short
19 recess.

20 SECURITY: Yes, sir. Five minutes.

21 MJ [COL HENLEY]: Why don't we go ahead and recess in place
22 unless does Mr. Jawad need to take a longer recess.

23 DC [MAJ FRAKT]: We are fine in place Your Honor.

1 MJ [COL HENLEY]: The commission is in recess.

2 [The military commission recessed at 0930, 14 August 2008.]

3 [The military commission was called to order at 0936, 14 August
4 2008.]

5 MJ [COL HENLEY]: The commission is called to order. All
6 parties present before the recess are again present. Counsel cross
7 examination.

8 TC [LTC VANDEVELD]: Thank you Your Honor.

9 **CROSS-EXAMINATION**

10 **Questions by the defense counsel:**

11 Q [LTC VANDEVELD]: Ms. Birt can you hear me?

12 A [MS. BIRT]: Yes, sir, I can.

13 Q [LTC VANDEVELD]: I am the prosecutor in this case. I want to
14 ask you a few questions about your investigation and its aftermath.
15 What happened to the guard who was prosecuted for the supposed abuse
16 of Mr. Jawad?

17 A [MS. BIRT]: I'm sorry sir.

18 Q [LTC VANDEVELD]: What happened to the guard who Mr. Jawad
19 identified as someone who had tossed him down the stairs? I assume
20 he was prosecuted was he not----

21 DC [LCDR DOXAKIS]: Objection.

22 MJ [COL HENLEY]: Basis?

1 DC [LCDR DOXAKIS]: There are several guards identified by Mr.
2 Jawad, he didn't identify just one.

3 MJ [COL HENLEY]: Colonel Vandeveld are you assuming that
4 someone was prosecuted?

5 TC [LTC VANDEVELD]: I am Your Honor.

6 MJ [COL HENLEY]: Is that a fair assumption to make. Was
7 someone prosecuted?

8 TC [LTC VANDEVELD]: I'll rephrase the question.

9 MJ [COL HENLEY]: Thank you.

10 Q [LTC VANDEVELD]: Ms. Birt you said that Mr. Jawad identified
11 guards or a guard who had supposedly tossed him down the stairway, do
12 you recall that part of your testimony?

13 A [MS. BIRT]: Yes, sir.

14 Q [LTC VANDEVELD]: And you said that you had followed the
15 prosecutions and had actually participated in them as I presume a
16 witness, is that right?

17 A [MS. BIRT]: Yes, sir, in some them.

18 Q [LTC VANDEVELD]: To your knowledge was anyone prosecuted for
19 any alleged abuse of Mr. Jawad?

20 A [MS. BIRT]: No, sir.

21 Q [LTC VANDEVELD]: Do you have any idea as to why no
22 prosecution was resulted?

1 A [MS. BIRT]: The cases I was involved in sir, had to do with
2 homicides and those were the primary focus of those investigations.

3 Q [LTC VANDEVELD]: Right, but there were others, other soldiers
4 who were in fact prosecuted for abuse that did not amount to
5 homicide, is that right?

6 A [MS. BIRT]: Yes, sir, that is correct.

7 Q [LTC VANDEVELD]: Now the guard or guards that Mr. Jawad
8 identified from a photo line up, which I am assuming is a photo line
9 up rather than just showing him one photo at a time. Did you speak
10 to any of those guards?

11 A [MS. BIRT]: Yes, sir, we did.

12 Q [LTC VANDEVELD]: And what was the result of those interviews?

13 A [MS. BIRT]: I interviewed approximately 99 members of the
14 Military Police Company over a three week period and we obtained 18
15 confessions or admissions from the military police to various degrees
16 of mistreatment, maltreatment or abuse. I cannot recall specifically
17 each individual but they are listed in my report.

18 Q [LTC VANDEVELD]: Did any of the guards admit to any abuse of
19 any sort of Mr. Jawad?

20 A [MS. BIRT]: No, sir, we did not question them with Mr. Jawad,
21 at the time we didn't know he existed.

22 Q [LTC VANDEVELD]: So after Mr. Jawad identified these guards,
23 you never attempted to question the guards, is that your testimony?

1 A [MS. BIRT]: Sir, I would have to refer to my report, but I do
2 not recall reapproaching any of the men who had previously been
3 interviewed.

4 Q [LTC VANDEVELD]: I don't suppose you have your report with
5 you do you?

6 A [MS. BIRT]: No, sir, I do not.

7 Q [LTC VANDEVELD]: Did you review it before your testimony?

8 A [MS. BIRT]: I reviewed a portion that was attached to the
9 defense motion, it contains several pages starting with page 10 of
10 one agent's investigative report that I did during this course of
11 this case. The two cases themselves probably are about two file
12 drawers deep.

13 Q [LTC VANDEVELD]: Did you speak to the assistant
14 prosecutor[sic] in this case, Lieutenant Commander Doxakis, if I
15 pronounce your name, Doxakis?

16 A [MS. BIRT]: Yes, sir, I did.

17 Q [LTC VANDEVELD]: And you did that just before you testified
18 today, yes?

19 A [MS. BIRT]: We did a Comm. Check via the VTC and we spoke on
20 the phone last week, sir.

21 Q [LTC VANDEVELD]: Well also this morning you went over the
22 questions that you would be asked today?

23 A [MS. BIRT]: I'm sorry, sir, I didn't understand the question.

1 Q [LTC VANDEVELD]: And you went over the questions that she was
2 going to ask you today, is that correct?

3 A [MS. BIRT]: She told me what she would be looking for me to
4 discuss during our testimony, yes, sir.

5 Q [LTC VANDEVELD]: And at some point did she tell you what she
6 wanted you to say?

7 DC [MAJ FRAKT]: Objection.

8 MJ [COL HENLEY]: Basis?

9 DC [MAJ FRAKT]: No good faith basis to ask the question.

10 MJ [COL HENLEY]: Overruled.

11 Q [LTC VANDEVELD]: At some point did she indicate what she
12 wanted you to say or not say? Take as much time as you like to think
13 about your answer.

14 A [MS. BIRT]: I'm sorry sir; we lost you there for a second,
15 could you please repeat.

16 Q [LTC VANDEVELD]: In your discussion about what your testimony
17 would be today with the assistant prosecutor, I'm sorry defense
18 counsel, you spoke about your testimony, you went over the questions
19 that you would be asked. You acknowledged that?

20 A [MS. BIRT]: Sir, we went over the broad details of what she
21 was going to ask me to testify to, not specific questions.

1 Q [LTC VANDEVELD]: When you say broad details did she give you
2 any indications as to what subject she wanted you to avoid or what
3 subject she wanted you to specifically to address?

4 DC [LCDR DOXAKIS]: Objection, relevance.

5 MJ [COL HENLEY]: Overruled.

6 A [MS. BIRT]: No, sir, she talked about wanting me to talk
7 about the investigations that I had done and how Mohammed Jawad was
8 related to them and how the Bagram facility was laid out at the time
9 that I visited it.

10 Q [LTC VANDEVELD]: Now you never found any corroboration at all
11 for Mr. Jawad's sworn statement is that right? You never found any
12 corroboration for Mr. Jawad's sworn statement, is that correct?

13 DC [LCDR DOXAKIS]: Objection Your Honor, it looks like it is
14 frozen here I don't think there is an intentional delay.

15 MJ [COL HENLEY]: Right I think we may have another technical
16 difficulty with the link.

17 DC [LCDR DOXAKIS]: In addition, Mr. Jawad didn't make a sworn
18 statement I'm aware of.

19 MJ [COL HENLEY]: All right I think we are back on.

20 Q [LTC VANDEVELD]: When you took Mr. Jawad's statement did you
21 find subsequently any corroboration for the statement?

1 A [MS. BIRT]: His complaints were very similar to the things we
2 had heard from other detainees and we were not specifically
3 investigating his allegations.

4 Q [LTC VANDEVELD]: So basically you didn't do any follow up on
5 Mr. Jawad's claims in the statement that you took?

6 A [MS. BIRT]: There was no statement sir, there was notes from
7 an interview we did through an interrogator or an interpreter and we
8 reduced those to writing from my notes, which are contained within
9 the case file.

10 Q [LTC VANDEVELD]: After taking your notes then did you do any
11 follow up as to what you had been told through an interpreter as
12 reflected in your notes?

13 DC [LCDR DOXAKIS]: Objection Your Honor, this is the same
14 question asked different.

15 MJ [COL HENLEY]: Sustained.

16 Q [LTC VANDEVELD]: Were you present at the trial of United
17 States v. Corsetti?

18 A [MS. BIRT]: Yes, sir.

19 Q [LTC VANDEVELD]: And were you there when your report and
20 notes were attempted to be introduced into evidence?

21 A [MS. BIRT]: I don't recall, sir, I was there for a period of
22 time and I testified once.

1 Q [LTC VANDEVELD]: And then you left the courtroom and that was
2 it?

3 A [MS. BIRT]: Correct, sir, I believe that's how I recall it;
4 it was a long time ago.

5 Q [LTC VANDEVELD]: When you spoke to the assistant defense
6 counsel today did you wish her good luck?

7 DC [LCDR DOXAKIS]: Objection Your Honor this is completely
8 irrelevant.

9 A [MS. BIRT]: Yes, sir.

10 MJ [COL HENLEY]: Colonel Vandeveld what's the point of that
11 question.

12 TC [LTC VANDEVELD]: Goes to bias motive, Your Honor.

13 DC [LCDR DOXAKIS]: Your Honor what this goes to is my interview
14 was televised around----

15 MJ [COL HENLEY]: Counsel.

16 DC [LCDR DOXAKIS]: ----this building this morning accidentally
17 and he watched it and is now using that.

18 MJ [COL HENLEY]: There will be occasions during the commission
19 where I don't need your position. I'm sustaining the objection,
20 okay. Let's move on counsel.

21 TC [LTC VANDEVELD]: Thank you for your service and I have no
22 more questions.

23 WIT [MS. BIRT]: Thank you sir.

1 MJ [COL HENLEY]: Do you have redirect counsel?

2 DC [LCDR DOXAKIS]: Yes, Your Honor just one moment please.

3 **REDIRECT EXAMINATION**

4 **Questions by the defense counsel:**

5 Q [LCDR DOXAKIS]: Ms. Birt you've testified in several trials
6 haven't you?

7 A [MS. BIRT]: Yes, ma'am.

8 Q [LCDR DOXAKIS]: Was there anything different about the way I
9 prepared you to testify in comparison to those other trials you've
10 testified in and your preparation for those cases?

11 A [MS. BIRT]: No ma'am given the length of time that elapsed
12 from when I conducted those investigative leads and now, I needed an
13 opportunity to refresh my recollection and understand what the court
14 wanted from me on this occasion.

15 Q [LCDR DOXAKIS]: Did we go over specific questions when I
16 talked to you?

17 A [MS. BIRT]: Nothing you asked me today I had before. We had
18 talked the same general areas, but not scripted questions no, ma'am.

19 Q [LCDR DOXAKIS]: Just to make sure you testified that Mr.
20 Jawad's statement to you was corroborated in several ways is that
21 correct?

22 A [MS. BIRT]: It was corroborated by similar statements from
23 other detainees it was not independently corroborated through the

1 investigation because he was not focus of our investigation. He was
2 something that came up that was ancillary and not related to the
3 homicides directly.

4 Q [LCDR DOXAKIS]: Now the abusive period at Bagram that you
5 were investigating was from the Fall of '02 to the Spring of '03
6 correct?

7 A [MS. BIRT]: Yes, ma'am that's when the 377th was there.

8 Q [LCDR DOXAKIS]: And that's also the same period of time that
9 Mr. Jawad was there correct?

10 A [MS. BIRT]: Yes, ma'am, it is.

11 Q [LCDR DOXAKIS]: And you indicated on cross examination that
12 you interviewed a number of guards, yes.

13 A [MS. BIRT]: Yes, ma'am.

14 Q [LCDR DOXAKIS]: Did those guards admit to the same types of
15 abuse that Mr. Jawad had reported to you?

16 A [MS. BIRT]: Some of them did, yes, ma'am.

17 Q [LCDR DOXAKIS]: Ms. Birt how many cases have you investigated
18 over the course of your career?

19 A [MS. BIRT]: It would be kind of hard to guess a couple
20 thousand probably.

21 Q [LCDR DOXAKIS]: It is fair to say that if some detainees died
22 due to the abuse that happened that others would be abused in a
23 milder type of fashion?

1 A [MS. BIRT]: I believe so yes, ma'am.

2 Q [LCDR DOXAKIS]: Were you surprised at all by the statement
3 that Mr. Jawad gave to you?

4 TC [LTC VANDEVELD]: Your Honor her degree of surprise is not
5 relevant, I'm sorry.

6 MJ [COL HENLEY]: Sustained.

7 DC [LCDR DOXAKIS]: Ms. Birt I don't have anything further for
8 you. Thank you for your testimony.

9 TC [LTC VANDEVELD]: Nothing further.

10 MJ [COL HENLEY]: Ms. Birt this Colonel Henley, the judge, thank
11 you very much for your testimony, you are excused, and I need to
12 remind you please don't discuss your testimony with anybody except
13 for the attorneys. Thank you very much.

14 WIT [MS. BIRT]: I understand sir, thank you.

15 MJ [COL HENLEY]: Disconnect the link please. Defense do you
16 have additional witnesses on the motion?

17 DC [MAJ FRAKT]: Your Honor, we had a plan to call Lieutenant
18 Colonel Zierhoffer, I believe the prosecutor has an announcement to
19 make about her availability.

20 MJ [COL HENLEY]: Counsel.

21 TC [LTC VANDEVELD]: Your Honor, I know this was inadvertent but
22 the person to whom he just referred is covered by a protective order.
23 She at one point was assigned to JTF Guantanamo and she is covered by

1 I think it is Protective Order 2, so I would ask in the future to
2 refer to her as Lieutenant Colonel Z. Just for clarification, I
3 spoke to Lieutenant Colonel Z this morning. She is at a conference;
4 she consulted an attorney at the conference. She wishes to exercise
5 her right and remain silent and you can call her to verify that, but
6 I believe that would be her position.

7 MJ [COL HENLEY]: What question did you intend to elicit or
8 responses from her. What's the scope of her testimony?

9 DC [MAJ FRAKT]: It was related to the assessment and
10 recommendation that's classified that I have provided as an
11 attachment. And we had intended to ask that she be advised of
12 Article 31 rights because the answers very likely would tend to
13 incriminate her, so we accepted the government's representation that
14 she would invoke those rights.

15 MJ [COL HENLEY]: Okay. Any additional witnesses?

16 DC [MAJ FRAKT]: No Your Honor, the other witness that we were
17 going to call Dr. Soldz was related to the potential testimony of
18 Colonel Z, so the defense rests on D004 and is prepared to argue.

19 MJ [COL HENLEY]: D004 was the Unlawful Influence Motion.

20 DC [MAJ FRAKT]: I beg your pardon, D008 Your Honor.

21 MJ [COL HENLEY]: D008 did you have additional witness on 4?

22 DC [MAJ FRAKT]: We have no additional witnesses or for this
23 hearing. The one outstanding issue is that we had promised you the

1 report of the detainee abuse of June 2nd, which is a classified
2 report, which we are working to obtain. But it's--I have alluded to
3 some of the findings of that in one of my reports. I think you will
4 have enough before you for argument purposes.

5 MJ [COL HENLEY]: For D8?

6 DC [MAJ FRAKT]: Yes, Your Honor.

7 MJ [COL HENLEY]: Okay. You can proceed on D8.

8 DC [MAJ FRAKT]: Well Your Honor since I have already argued
9 this motion once. I want to focus my argument on things that we have
10 learned since June the 19th the last time we were here in this
11 courtroom.

12 First I should say, Supplement 5 to D008, which refers to
13 the BSCT assessment or recommendation was submitted last Wednesday.
14 Seven calendar days have elapsed, no response was submitted, no
15 request for an extension was submitted and really every fact alleged
16 in that motion was fully substantiated with government records. So I
17 think at this point those facts can be assumed or have been proven to
18 be true.

19 So what have we learned since June 19th, we've just learned
20 about the horrendous abuse that Mohammed Jawad was subjected to at
21 Bagram prison, abuse that he was so eager to tell the Court about the
22 last time when he took the stand on June 19th. He was repeatedly
23 beaten, pushed down the stairs, hooded, chained to the wall, held in

1 stress positions, and deprived of sleep as he alluded to in his
2 testimony. These facts are undisputed. There is no reason to
3 suspect bias on the part of this investigator.

4 People died. People were beaten to death at Bagram. It
5 should not be surprising that people were also subjected to milder
6 forms of abuse. In late 2002 and early 2003, Bagram was not a
7 detention camp, it was a torture chamber. A cesspool of human
8 cruelty where angry and sadistic young men avenged their downed
9 American comrades by savagely beating prisoners, sometimes even to
10 death.

11 It is almost impossible to imagine, American soldiers
12 beating prisoners to death while other prisoners could do nothing to
13 help them. Prisoners like Mohammed Jawad who sat helplessly in their
14 cells listening to the screams and the begs, begging for mercy.
15 Perhaps Mohammed was relieved to be sent to Guantanamo after his 49
16 day stay at Bagram prison. Perhaps he thought he was being taken to
17 a better place. What was going through young Mohammed's head as the
18 hood was placed over it and he was put on a plane for the unbearably
19 long flight from Afghanistan to Guantanamo?

20 How could he process what was happening to him. How lonely
21 and desperate must his life have been at that point? For the
22 Americans waiting here at Guantanamo to receive him knew all about

1 his hopelessness and his desperation and had a specific plan in place
2 to exacerbate it and exploit it.

3 Standard Operating Procedures, Camp Delta, upon arrival 30
4 days in isolation. No human contact, no chaplain, no ICRC, no Koran,
5 nothing to comfort a teenage boy. And the only thing to break up the
6 stultifying monotony, the terrifying loneliness, was the occasional
7 interrogation.

8 But they didn't break Mohammed Jawad, at least not the way
9 they wanted him to break. They could not get him to budge from his
10 denial of throwing the hand grenade. Time and time again they tried
11 and he stuck to his cover story as they called it. How was this
12 unschooled, ignorant, teenage boy able to resist, the skilled,
13 practiced interrogators for months and years on end? How could he so
14 consistently hold to his adamant denial of responsibility? When the
15 hardened terrorist couldn't. When they broke down and confessed.
16 According to the BSCT psychologist his resistance technique was
17 feigned homesickness.

18 TC [LTC VANDEVELD]: Your Honor, I absolutely hate to disrupt
19 closing argument but the BSCT report and its contents are classified
20 and I would ask counsel to refrain in the future from.

21 DC [MAJ FRAKT]: No more references to BSCT. It simply never
22 occurred to anyone that Mohammed Jawad might just be telling the
23 truth. He even asked for a polygraph, but this request was denied.

1 Instead of being given a chance to establish his innocence he was
2 given another 30 days in isolation, moved away from the neighbors
3 with whom he had started to bond, told that his family had abandoned
4 him, linguistically isolated so that the had no one to talk to and
5 nowhere to turn except to his interrogator.

6 In September 03, when an interrogator observed Mohammed
7 talking to posters on the wall, he was concerned about his mental
8 health. They didn't call for a mental health professional to care
9 for him. They called for the BSCT, and you have before you, which I
10 will not reference what she said in this most chilling document of
11 all.

12 What has this country come to, when a licensed
13 psychologist, a senior officer in the U.S. Armed Forces, someone
14 trained in the art of healing broken hearts and mending broken minds.
15 Someone with the duty to do no harm turns her years of training and
16 education to the art of breaking people, to the intentional
17 devastation of a lonely, homesick, teenage boy.

18 We also learned courtesy of Major Orlich quite a bit about
19 the frequent flyer program that we didn't know last time. We learned
20 that it was an official standard operating procedure, carried out
21 with ruthless efficiency everyday for years according to the MATRIX.

22 MJ [COL HENLEY]: Major Frakt slow down.

1 DC [MAJ FRAKT]: Yet although it was standard operating
2 procedure it was an off the books standard operating procedure. Not
3 included in any published SOP, indeed although this program was
4 approved by the senior leadership of JTF GTMO. The government has
5 failed to produce a single document purporting to authorize this
6 program or even describe the program. No legal review was apparently
7 done, for if it had been done this program could not have survived
8 legal scrutiny.

9 Major Orlich called it an incentive program. Be a good
10 prisoner and you'll get to stay in your cell 23 hours a day instead
11 of being moved from cell to cell like a human ping bong ball. Major
12 Orlich's testimony made it clear that the frequent flyer program was
13 simply punishment for prisoners the guards didn't like for one reason
14 or another. Major Orlich suggested that the program was reserved for
15 the worst of the worst of the worst of the worst, the most violent
16 trouble makers, those who assaulted the guards, the spitters, the
17 feces throwers.

18 The defense is not suggesting that there can be no
19 legitimate disciplinary measures for those detainees who engage in
20 such activities. But misconduct by a detainee does not authorize
21 torture. Major Orlich suggested that the frequent flyer program
22 promoted safety and security for the guards but this simply makes no
23 sense. Moving a detainee 8 times a day for weeks on end simply

1 exposes the guards to these most violent prisoners unnecessarily day
2 in and day out.

3 Major Orlich's testimony unfairly and inaccurately implied
4 that if Mohammed Jawad was subjected to the frequent flyer program
5 then he must have been one of the worst, one of the violent ones.
6 But no evidence has been offered by the government to substantiate
7 such an inference and indeed there is no such evidence. The DIMS
8 records do not indicate a single violent incident, no feces or blood
9 or urine throwing.

10 Mohammed Jawad's worse offense was cross-block talking,
11 when he was linguistically isolated on purpose from his fellow
12 countrymen who could speak his language. This was not a violent,
13 ardent, hateful, Jihadist, this was a teenage boy who virtually every
14 time he was interrogated broke into tears, begging to go home to his
15 mother and his little brothers and sisters. And dozens of others
16 detainees were subjected to the frequent flyer program.

17 We have identified many in our filings, but it is clear
18 that the defense was provided only a fraction of the records covering
19 only a limited period of the program, which Major Orlich indicated
20 continued for years.

21 The documents released by Senator Levin and new revelation
22 and books by Jane Mayer and others meticulously document the torture
23 had become the official policy of the United States, wholeheartedly

1 endorsed and carried out with unquestioning and ruthless efficiency
2 by mindless zombies like Major Orlich. Is it possible that he really
3 believes that moving a detainee back and forth from cell to cell like
4 a human pendulum, every three hours, 112 times for 2 weeks is humane,
5 or was he just lying to cover his derriere following the lead of his
6 senior officers?

7 In one sense it was an unfair question. Obviously he could
8 not admit that he had ordered and carried out something that was
9 inhumane for that would be prisoner abuse, a grave breach of the
10 Geneva Conventions and a clear violation of state and U.S. Policy.
11 Actually in credit to Major Orlich he was refreshingly candid about
12 the frequent flyer program. He was the first witness with knowledge
13 of the program that didn't lie about it. It is obviously now that
14 Major General Hood and Major General Cannon did lie about it. The
15 reason for their reluctance to testify should now be crystal clear.

16 Major General Hood's claim to this commission and to
17 Lieutenant General Schmidt during the Schmidt Furlow investigation
18 that he had ordered the frequent flyer program stopped was only half
19 the truth at best. He may have ordered the frequent flyer program
20 run by the Joint Interrogation Group, discontinued as an
21 interrogation technique because he considered it counterproductive,
22 but he clearly allowed the frequent flyer punishment program carried

1 out by the Joint Detention Operations Group, to continue and flourish
2 under Major Orlich and his henchmen.

3 The program was not stopped in March 2004. We know that
4 Mohammed Jawad was subjected to it in May 2004 and it continued
5 according to Major Orlich who was certainly in a position to know
6 until at least April 2005. We still don't know when it stopped. The
7 government is still withholding records and hiding the truth about
8 this program.

9 Major Orlich said that he was not aware of any complaints
10 by the guards about the frequent flyer program, that no one raised
11 any concern about it at all. Unfortunately, he was very likely being
12 truthful about this. And this is one of the most troubling aspects
13 of his testimony. What are we teaching our young soldiers and young
14 officers? How is it that hundreds of soldiers could be involved in
15 such an obviously abusive program for years without a single voice of
16 protest or dissent being raised?

17 What has happened to our basic human decency? Where was
18 the moral courage that differentiates a true soldier from a mere
19 automaton? Something happened in the detention camps in the early
20 years of Guantanamo that was very ugly. Prisoners of War, captured
21 enemy combatants, became mere numbers. Not Mohammed Jawad, teenage
22 kid, but ISN900 terrorist. In a misguided effort at Force Protection
23 the guards also became mere numbers. Their name tags that identified

1 them, as fellow human beings replaced with Velcro strip bearing a
2 number or an acronym.

3 Behind the comfortable cloak of anonymity stripped of their
4 individuality, the guards were no longer proud soldiers fighting for
5 the American way of life, but merely cogs in a machine. The group
6 think mentality took hold, if it can be called thinking at all.

7 Outrageous government conduct, conduct which shocks the
8 conscience is a lawful basis for dismissal of criminal charges, even
9 serious ones. The sheer weight of the government's misconduct
10 against Mohammed Jawad is staggering. Everything about this case
11 reeks of outrageous government conduct. From the physical torture at
12 Bagram to the psychological torture at Guantanamo. The beatings, the
13 sleep deprivation, the isolation of a teenage boy, the parade of
14 lying Generals, Hartmann, Hood and Cannon, concerned only about
15 protecting their own selfish interests and promoting their careers.
16 The slimy situational ethics of the Chief Prosecutor, the cold
17 blooded Major Orlich and his incentive program. The cruel and
18 heartless assessment and recommendations of the BSCT psychologist.
19 The intentional withholding even destruction of specifically
20 requested and relevant evidence from the defense. The repeated
21 denial of access to relevant witnesses and now the unfounded
22 accusations of witness coaching against my co-counsel.

1 If ever there were a textbook case of outrageous government
2 conduct this is it. Almost anyone of these things independently
3 would be sufficient to warrant dismissal. Cumulatively, it is not
4 even a close call. Mohammed Jawad has been denied justice, due
5 process and fair treatment for nearly six years. It is time for that
6 to end right here and right now. Thank you.

7 MJ [COL HENLEY]: Thank you counsel. Government?

8 TC [LTC VANDEVELD]: Well it was a nice speech but I am sure we
9 will see again in print somewhere, but as to whether or not it would
10 be of any help to this commission the answer is no. Because it fails
11 to address the testimony, in an unbiased way, in a way that the
12 commission can look at it objectively in making its decision on a
13 case, which has already been argued. It was argued on June 19th and
14 since then has been the subject of at least five supplemental filings
15 and by the way, not responding to the latest defense filing doesn't
16 violate or implicate the military commission's trial judiciary rules
17 for court because there is no time set as I read those rules, for
18 responding to a defense supplemental, nor is there any requirement
19 that we do so.

20 In this case we have been besieged by so many supplementals
21 that it would take a battalion of JAG lawyers to respond to every one
22 and so we haven't. Let's look at the facts that have been adduced in
23 this hearing. We had Doctor Meneley a defense witness who was called

1 to testimony. And what he says there is no evidence and he has
2 reviewed medical records on Mr. Mohammed Jawad on torture. There is
3 no evidence, medical evidence of coercion of Mr. Jawad.

4 And I asked him specifically on the stand do you stand by
5 your declaration doctor? And he said under oath that he does. And
6 there was nothing that the defense offered to impeach Doctor
7 Meneley's testimony regarding Mr. Jawad's health and specifically in
8 is declaration where he says. He has been in general good health,
9 physically and mentally since he arrived at Guantanamo and
10 continuously throughout. Those are the facts that Doctor Meneley
11 testified to that the commission can rely on. Not suppositions, not
12 innuendos, not condemnations of senior leaders based upon scant or
13 even non-existent evidence.

14 I find it particularly appalling his comment about the
15 chief prosecutor in this case. I won't even repeat the words, but
16 they don't bear any credibility, doing any credit to. In fact they
17 are so offensive in the extreme the commissions should disregard them
18 entirely. As to the other senior leaders who testified or submitted
19 declarations they were interviewed by Major Frakt. Who clearly feels
20 impassioned about this case and may have let his passion about his
21 case interfere with his sound otherwise sound legal judgment.

22 He had an opportunity to interview these witnesses in depth
23 and the court has their testimony before the commission. And I would

1 urge the court to look at the testimony and ignore the innuendo and
2 supposition that Major Frakt has urged in his speech today.

3 Regarding Major Orlich, he testified very clearly and very
4 forthrightly as the court saw on the video teleconference screen. He
5 wasn't some drone. He wasn't some mindless soldier, robotic soldier
6 who carryout a task for an order that he was given. He gave
7 thoughtful, careful answers to questions that frankly might have
8 incriminated him if he had answered otherwise, but instead he
9 described the frequent flyer program omitting no detail, stating that
10 it was not a punishment regime that it was designed to allow the
11 guard force, which he said had been subjected to almost daily
12 attacks, if not daily attacks. To allow them to maintain control
13 over accused war criminals. These are not regular prisoners.

14 I believe the court has before it the deposition of Captain
15 McCarthy, if not we will make it available to the court. And in that
16 deposition, Captain McCarthy testifies the prisoners or the detainees
17 are kept at Guantanamo not to punish them pretrial, not to inflict
18 vengeance upon them for acts that they are alleged to have committed,
19 but rather because they are unlike any other detainees or prisoners
20 in the United States who have been sentenced and are serving their
21 time. These are in most instances, in many instances, sworn enemies
22 of the United States and that includes everyone in this room,
23 everyone in this room not wearing a uniform. And they cannot be

1 treated in a way that a prisoner in the United States or elsewhere
2 might be treated. They have to be held in conditions that protect
3 Americans.

4 And I asked, if you recall I asked Major Orlich what would
5 happen if the detainees condition seemed to deteriorate during his
6 participation in the frequent flyer program and he said medical help
7 would be summoned immediately. And I asked him did Mr. Jawad ask for
8 medical help. And he said as I recall no. And the medical records
9 that the court has been provided with and that have been reviewed by
10 Doctor Meneley show that on May 20th when Mr. Jawad's participation
11 in frequent flyer program ended. He was seen by a psychiatric
12 technician.

13 Now in past filings the defense has derided these
14 psychiatric technicians as unqualified, almost idiotic people, drones
15 maybe, but in fact Doctor Meneley said they are trained, they are
16 well trained and he relies on their observations in order to do his
17 work and to make his diagnosis and prescribe a course of treatment.

18 They saw him; they saw Mr. Jawad on May 20th and Mr. Jawad
19 complained of no psychiatric problems, no problems sleeping that is
20 consistent with Major Orlich's testimony. Beyond the 8 moves a day
21 on average, the detainees, Mr. Jawad, could have slept the entire
22 time. So except for the time that it took to make these moves, Mr.
23 Jawad could have slept the day away and that is consistent with his

1 lack of complaint about being sleep deprived or having his sleep
2 disrupted when he was interviewed by a psychiatric technician when
3 his participation in the program ended.

4 And let me make this clear, the Office of Military
5 Commissions Prosecution doesn't defend any abuse of detainees; we
6 don't defend anything that happened at Bagram. We simply want the
7 facts as they are the truth as it is to come up so that the court can
8 apply the law in this case to those facts. I'm not sure what
9 happened at Bagram. There is no evidence that I am aware of to
10 contradict what Mr. Jawad or rather what Agent Birt or Ms. Birt's
11 testimony today suggested that he had beaten and thrown downstairs.
12 It's not my job to defend that. I don't know if it occurred or
13 didn't occur, but the fact is there is no basis under the law, even
14 if you were to perceive all of these facts to be true for dismissing
15 this case.

16 The sole sources of law before this commission are the MCA
17 and the MMC and they address statements taken or obtained through
18 torture and statements obtained by coercion and that is really what
19 we are talking about here. What does the MCA say the commission's
20 remedy is in this case despite whatever evidence of mistreatment is
21 before the commission? And it is clear and it is clear from the case
22 law, no case in the history of American jurisprudence, much less

1 under the MCA or MMC has been dismissed for outrageous government
2 conduct that has occurred during detention.

3 Now throughout all the defense supplements, they have
4 attempted to find cases that support their position. And we have
5 distinguished those cases sometimes in ways that defy description.
6 Where a snippet from a case will be taken and presented to the
7 commission as the law when in fact, a review of the case in full
8 shows that it doesn't support the position at all. And I won't go
9 through those cases because they are before the court in our filings.

10 So the Office of Military Commissions Prosecution doesn't
11 defend what is history. We want to know what history is, we want to
12 inform the commission and the defense. Give the defense all the
13 information that it has to determine what occurred in the past. And
14 we want the commission to apply this history to the law. And we are
15 confident that if the commission does so, the commission will find
16 that it has no authority for the relief requested in Motion D008. I
17 would ask that the Motion to be dismissed be denied.

18 MJ [COL HENLEY]: Thank you counsel. Regarding the Defense 4,
19 the accused moves this commission to dismiss the remaining charges
20 and specifications alleging the legal adviser to the convening
21 authority unlawfully influenced the prosecutors exercise of
22 professional judgment in the execution of his duties in this case.

1 The government opposes the motion arguing in part that the
2 legal adviser's conduct in relation to the chief prosecutor and his
3 staff did not amount to unlawful influence, but was instead
4 consistent with his dual and complimentary roles as Supervisor of the
5 Office of Military Commissions Prosecution and Legal Adviser to the
6 Convening Authority, Department of Defense Office of Military
7 Commissions.

8 While the commission ultimately concludes the accused is
9 entitled to relief, dismissal of the charges is not the appropriate
10 remedy. Colonel Morris Davis assumed duties as chief prosecutor for
11 the Office of Military Commissions around September of 2005.
12 Brigadier General Thomas Hartmann was assigned as Legal Adviser to
13 the Convening Authority on or about 2 July 2007. At the time that
14 Brigadier General Hartmann began this assignment, there was no
15 written job description detailing the relationship between the legal
16 advisor to the convening authority and the Chief Prosecutor Office of
17 Military Commissions.

18 Brigadier General Hartmann viewed the legal adviser as
19 serving two separate and distinct functions. One supervising the
20 chief prosecutor and prosecution staff to include, setting goals and
21 milestones and developing an advocacy training program for the
22 prosecution office, and two providing counsel to the convening

1 authority including informed advice on referral decisions and post-
2 trial recommendations regarding action on completed cases.

3 Brigadier General Hartmann understood case selection and
4 whether and when to swear charges in given cases was within the chief
5 prosecutor's discretion. Soon after assuming his duties as legal
6 adviser, Brigadier General Hartmann became frustrated with what he
7 perceived was a lack of urgency exhibited by the chief prosecutor and
8 his staff and disappointed with the pace at which cases were being
9 processed.

10 Brigadier General Hartmann let the chief prosecutor and
11 members of the prosecution staff know about his dissatisfaction and
12 personally tried to light a fire under what he perceived was morbid
13 and stagnant, ineffective prosecution office that had not tried a
14 contested case since its inception. His efforts in doing so have
15 been characterized by some in the prosecution office and the
16 commission support group as nano-management and cruel and unusual
17 punishment.

18 On at least one occasion, Brigadier General Hartmann
19 suggested to OMC Prosecution that they should have three cases ready
20 to go and recommended they select cases that would "capture the
21 imagination of American people." To Brigadier General Hartmann this
22 meant case materiality, the chief prosecutor understood this

1 direction to refer to cases where the accused had "blood on his
2 hands."

3 Brigadier General Hartmann did not mention specific cases
4 or the name of a particular accused. During a prosecution office
5 vetting session for this case on 2 October 2007, all attendees to
6 include Colonel Davis and Lieutenant Colonel William Britt agreed
7 that charges in the United States versus Mohammed Jawad were ready to
8 be sworn. Brigadier General Hartmann was not present and unaware of
9 this decision.

10 On 3 October 2007, the Deputy Secretary of Defense issued
11 an appointing letter establishing a chain of command for the Office
12 of Military Commissions Prosecution. The chief prosecutor would now
13 work for the legal adviser to the convening authority and the legal
14 adviser would now report to the DOD General Counsel. Colonel Davis
15 learned of this rating scheme on 4 October 2007 and immediately
16 offered his resignation, which was accepted on Friday, 5 October
17 2007. Lieutenant Colonel Britt assumed duties as Acting Chief
18 Prosecutor.

19 Monday, 8 October 2007, was a federal holiday. On Tuesday,
20 9 October 2007, Lieutenant Colonel Britt approved the swearing and
21 transmittal of charges against the accused. Lieutenant Colonel Britt
22 was not rushed; in fact he thought charges were long overdue. While
23 United States versus Mohammed Jawad was not the highest priority for

1 OMC Prosecution. Lieutenant Colonel Britt thought the case was ready
2 to go to trial and unlike others had been cleared by the Office of
3 Director of National Intelligence.

4 While Brigadier General Hartmann created and updated a
5 timeline on the processing of various commission cases and required
6 briefings by the prosecutors on their status to include United States
7 versus Jawad. He did not order the swearing of charges in this case.
8 The decision to approve the swearing of charges was an independent
9 decision by the Lieutenant Colonel Britt as Acting Chief Prosecutor
10 and he was not coerced or influenced by Brigadier General Hartmann to
11 do so. Lieutenant Colonel Britt continued to serving as acting chief
12 until on or about 7 November 2007, when Colonel Lawrence Morris
13 arrived in the office. No political appointee of the U.S. Government
14 discussed this case with Brigadier General Hartmann prior to 9
15 October 2007.

16 On or about 21 January 2008, the accused's original defense
17 counsel submitted a memorandum to the legal adviser detailing various
18 extenuation and mitigation matters and requested that it be provided
19 to the convening authority contemporaneous with her referral
20 decision. The legal adviser declined to append the memo to his 28
21 January 2008 pretrial advice and did not summarize the points
22 requested. The pretrial advice ultimately recommended a non-capital
23 referral though a capital sentence is not authorized for the offenses

1 charged in this case. The convening authority approved the legal
2 adviser's recommendations on 30 January 2008, and referred the
3 charges to trial before a military commission.

4 From at least February 2008 through early April 2008
5 Brigadier General Hartmann scheduled and monitored several secure
6 video teleconferences for Senior Joint Task Force Guantanamo Bay
7 personnel and himself regarding the status of and support to
8 commission cases. To at least one attendee Brigadier General
9 Hartmann appeared to running the prosecution and ordered all ICRC,
10 medical and intelligence records be sent to him. While Brigadier
11 General Hartmann discussed the prosecution plan for particular cases,
12 to include United States versus Jawad he did not tell the other
13 secure video teleconference attendees that he had ordered charges be
14 sworn against this accused.

15 The accused asserts that Brigadier General Hartmann
16 violated 10 USC Section 9, 49(b)(a)(2)(c) and RMC 104(a)(2) by
17 attempting to coerce or by unauthorized means influence the
18 prosecutors exercise of professional judgment and submits the
19 appropriate remedy is dismissal of the charges. The commission
20 disagrees.

21 Similar nature to that given by Staff Judge Advocate, the
22 legal adviser to the convening authority provides legal advice and
23 recommendations at two distinct stages pretrial and post-trial, CRMC

1 103(a)(15). The responsibility of the legal adviser at the pretrial
2 stage is clearly distinct from his post-trial review functions. This
3 commission is under no illusion that Brigadier General Hartmann in
4 preparing the RMC 406 pretrial advice as legal advisor to the
5 convening authority was completely disinterested in the successful
6 prosecution of United States versus Mohammed Jawad. In fact script
7 and partiality of a judicial nature at this stage would be entirely
8 inconsistent with the regulatory requirement that the legal adviser
9 provide a personnel and independent recommendation to the convening
10 authority on the disposition of the case see generally RMC 406.

11 In order to make an informed appraisal of the charges there
12 is nothing inherently wrong about a legal adviser asking questions
13 about a case to determine its relative strengths and weaknesses
14 especially in complex high profile trials. Further it is not
15 unreasonable for the legal advisor to want to increase the chances of
16 successful prosecution by establishing an advocacy training program
17 for the prosecutors. In other words a superior can demonstrate an
18 interest in the successful prosecution of a case without exerting
19 improper influence over it.

20 The evidence establishes that Brigadier General Hartmann's
21 pretrial conduct in this case does not constitute unlawful influence
22 over the exercise of the trial counsel's professional judgment.
23 Rather the commission finds it is consistent with his supervisory

1 responsibilities as the legal adviser to the convening authority and
2 the chief prosecutor's direct supervisor. While the evidence
3 unequivocally demonstrates Brigadier General Hartmann desire to
4 control the entire military commissions operations and some have
5 questioned the methods and leadership style used to do so. There is
6 no evidence that Brigadier General Hartmann induced or swayed the
7 otherwise independent and uncoerced decisions of Lieutenant Colonel
8 Britt to approve the swearing of charges against this accused or
9 Judge Crawford to refer them to trial before a Military Commission.

10 The evidence establishes and the commission finds nothing
11 that Brigadier General Hartmann has done can reasonable be construed
12 as improper influence of the trial counsels professional judgment and
13 swearing of charges against this accused. The requested remedy of
14 the dismissal of charges is therefore denied.

15 While that part of the accused's motion to dismiss the
16 charges is denied the commission's analysis does not end. The
17 commission acknowledges that as is the case here, a legal adviser's
18 pretrial duties may on occasion necessitate close association with
19 the prosecution team. This affiliation does not necessarily mean the
20 legal adviser is disqualified from fulfilling his pretrial duties.
21 However a legal adviser's post-trial responsibilities necessitate
22 that he act in a quasi judicial role one where he must remain neutral
23 and unbiased.

1 The commission finds that the current legal adviser
2 editorial writings and interviews defending the military commission
3 system combined with his active and vocal support of and desire to
4 manage the military commission's process. And public statements
5 appearing to directly align himself with the prosecution team, have
6 compromised the objectivity necessary to dispassionately and fairly
7 evaluate the evidence and prepare the post-trial recommendation.

8 In this regard, the commission notes that the legal adviser
9 testified in a previous session as to a contested matter and there
10 exists a material factual dispute regarding his actions relaying to
11 the referral of charges in this case, which will likely be one of
12 many errors alleged by the defense and addressed in a post-trial
13 recommendation.

14 While the commission finds the legal adviser pretrial
15 conduct does not merit dismissal with the charges it has impacted his
16 ability to impartially execute his post-trial responsibilities and
17 warrants disqualification from preparing any post-trial review of the
18 case. Therefore the interests of justice suggest and the commission
19 orders that the convening authority seek a post-trial recommendation
20 from a different legal adviser should one be necessary in this case.

21 As to the pretrial advice, it should generally include a
22 brief summary of the evidence and discussion of significant
23 aggravating, extenuating and mitigating circumstances, see discussion

1 to RMC 406. The original defense counsel in this case submitted a
2 memorandum to the legal adviser detailing a number of extenuating and
3 mitigating circumstances and requested that it be forwarded to the
4 convening authority. It was not provided. No explanation was given
5 and the legal adviser did not summarize the information.

6 While failure to include such discretionary matters in a
7 pretrial advice is not jurisdictional error and does not invalidate
8 the convening authority's original referral decision, the issues
9 raised by the original defense counsel warranted consideration. In
10 addition the commission notes the legal adviser recommended the
11 charges be referred non-capital although death is not an authorized
12 punishment for attempted murder. To correct this error and afford
13 the accused full opportunity to present relevant extenuating and
14 mitigating factors, the commission orders that any defense matters
15 will be forwarded to the convening authority for consideration not
16 later than 15 September 2008.

17 The legal adviser will not supplement his original pretrial
18 advice. The convening authority should ratify her original decision
19 as to disposition of the charges or take other action as deemed
20 appropriate not later than 1 October 2008. Counsel will be provided
21 a written copy of court's ruling at the close of today's session.

22 Additionally the parties will file by 9 September 2008,
23 briefs on the following questions. Question one: must the

1 government prove the accused status as an alien unlawful enemy
2 combatant as an element of the offense of attempted murder in
3 violation of the law of war: Question two, assuming the answer to
4 question one is yes, is such a finding sufficient to establish beyond
5 a reasonable doubt that the attempted murder in this case is a
6 violation of the law of war? Question three assuming the answer to
7 question two is no, what is?

8 Further the government will provide all oral, written, and
9 video statements of the accused to defense counsel not later than 18
10 August 2008. All motions to suppress statements will be filed not
11 later than 9 September, response by 16 September, reply briefs 18
12 September.

13 And finally by the next session a CSRT will have determined
14 whether the accused is an alien unlawful enemy combatant or the
15 government should be prepared at the next session to present evidence
16 before this commission establishing the accused's status as an alien
17 unlawful enemy combatant. The defense would be allowed to present
18 evidence that the accused is not an alien unlawful enemy combatant.

19 The next commission session is scheduled for 25 - 27
20 September 2008. Lastly, absent specific authorization of the
21 commission no supplemental briefs will be accepted for Defense 2, 7,
22 8 and 12.

1 Is there anything else--I will send out the scheduling
2 order by email in case you did not have a chance to write it down?
3 Is there anything else we can address this morning, Major Frakt.

4 DC [MAJ FRAKT]: Yes, Your Honor, with the--we have asked for a
5 line by line response to our discovery requests is it possible to get
6 an order to get a line by line response to our original 29 April
7 discovery response.

8 MJ [COL HENLEY]: The 29 April 2008, discovery request.

9 DC [MAJ FRAKT]: Yes.

10 MJ [COL HENLEY]: Do you recall the request trial counsel?

11 TC [LTC STEVENSON]: Yes, Your Honor, the government's aware of
12 the request he is responding to but----

13 MJ [COL HENLEY]: And in your reply was there a line by line
14 response?

15 TC [LTC STEVENSON]: There was not a line by line but everything
16 was read and anything, based on the request that we are required to
17 provide him either have been provided or are currently being
18 provided, so we really don't understand what the--is this a
19 secretarial thing that he is asking for. We didn't understand what
20 he is asking for and have addressed with counsel and in this
21 proceeding any issues we see otherwise we turned it over or are
22 working on turning it over. The government fails to understand----

23 MJ [COL HENLEY]: Do you have a copy of the response.

1 DC [MAJ FRAKT]: Yes, sir. [Handing copy to military judge.]
2 MJ [COL HENLEY]: This was the request do you have the----
3 DC [MAJ FRAKT]: There has been no response Your Honor that is
4 what I have been trying to say.
5 MJ [COL HENLEY]: I misunderstood is there a specific written
6 response from the government to what I am holding in my hand.
7 TC [LTC STEVENSON]: Not line by line to that, however, as to
8 substantially to the what he is asking for there have been responses
9 but not line by line.
10 MJ [COL HENLEY]: You might anticipate what I am about to say.
11 Respond to the specific request so give him a piece of paper with a
12 reply to what they are requesting, if its you have already turned it
13 over then that's what you say. Okay?
14 TC [LTC STEVENSON]: Yes, sir.
15 MJ [COL HENLEY]: So if the format is at issue go ahead and
16 reduce your reply in writing, as to the status of the request, if it
17 is done fine, if you are not going to do it the reason why.
18 TC [LTC STEVENSON]: We will sir.
19 MJ [COL HENLEY]: Okay. When do you think you can get that
20 done?
21 TC [LTC STEVENSON]: By 18 August.
22 MJ [COL HENLEY]: Do you need this back Major Frakt.

1 DC [MAJ FRAKT]: I will retrieve, Your Honor, yes. [Defense
2 retrieved document from military judge.] One other issue that we
3 have not fully vetted is the JTF GTMO policy that the defense is not
4 allowed to talk to any witnesses any JTF GTMO personnel without a
5 court order. We find that to be overly cumbersome and unfair. We
6 would like to be able to talk to whoever we think is a relevant
7 witness without having to notify the prosecution, notify the JTF
8 GTMO, having to provide detailed justifications. If it is necessary
9 as a courtesy to inform them that we are going to speak to someone
10 that is fine, but the interference with our independence is quite
11 troubling.

12 MJ [COL HENLEY]: You want to interview someone you know and you
13 are being prohibited from doing so?

14 DC [MAJ FRAKT]: We have been prohibited from interviewing
15 Captain Meneley; we have been prohibited from interviewing Brigadier
16 General Zanetti until the court specifically ordered that. If such a
17 situation were to arise in the future was another witness that we
18 wanted to speak to. We would like a clarification that we should not
19 have to get a court order to speak to a witness that we think is a
20 relevant witness.

21 MJ [COL HENLEY]: Colonel Vandeveld are you aware of the JTF
22 Policy, or order or regulation written or otherwise?

1 TC [LTC VANDEVELD]: What I have seen is an email from Captain
2 McCarthy who was the former SJA informing me that a court order would
3 be required before any of his personnel would be allowed to speak to
4 the defense. It seems to me that it has worked out well----

5 MJ [COL HENLEY]: Captain McCarthy's personnel or JTF personnel,
6 I mean no one belongs to Captain McCarthy.

7 TC [LTC VANDEVELD]: Well there was a request to speak to
8 certain people in the JTF Guantanamo SJA Office and that's the email
9 that I saw.

10 MJ [COL HENLEY]: Well Captain Meneley and General Zanetti don't
11 work in that office, were they--are you telling the commission Major
12 Frakt that neither of those individuals would talk to you absent a
13 court order.

14 DC [MAJ FRAKT]: That's correct Your Honor and that specifically
15 included in the government's response to my witness request and they
16 endorsed the policy by JTF Guantanamo and they specifically
17 referenced that General Zanetti would not authorized or Captain
18 Meneley authorized.

19 MJ [COL HENLEY]: Do you know the justification is it.

20 TC [LTC VANDEVELD]: It's operational and it is also, as I
21 understand it, it's operational. What I would suggest sir is I
22 haven't attempted to impede access to these witnesses, if you have a
23 request please route it through me and I will do what I can. It

1 turns out that the policy does continue that a court order is
2 required then we can address it with the commission at that time,
3 but.

4 MJ [COL HENLEY]: Can you point the commission to the authority
5 that requires a court order before the witness would be allowing
6 himself or herself to be interviewed by the defense counsel.

7 TC [LTC VANDEVELD]: I know of no such order.

8 MJ [COL HENLEY]: So why would one be needed in this case.

9 TC [LTC VANDEVELD]: Well what I am asking for is notice from
10 the defense and then I'll attempt to make the arrangements. I don't
11 expect----

12 MJ [COL HENLEY]: Do you have any particular people in mind, who
13 do you need to talk to that has indicated they won't talk to you
14 without an order, let's just talk short term.

15 DC [MAJ FRAKT]: One of the people that we wanted to talk to has
16 since departed the island without us getting an opportunity to talk
17 to her so we don't have anyone right at this moment that we have been
18 prohibited from speaking to. We don't like to have to show up, get a
19 court order, interview someone in the side room for ten minutes and
20 put them on the stand totally unprepared that is not the way to run
21 the commission. We want to be able to talk to witnesses in advance,
22 find out what they know, and then ask that the witness be produced

1 for the hearing if they have a relevant testimony to provide. I need
2 to be able to go where the leads take us.

3 MJ [COL HENLEY]: I understand that and that appears to be a
4 reasonable position. I'm still unclear where this order is coming
5 from.

6 TC [LTC VANDEVELD]: As I understand it, it came from a defense
7 witness Captain McCarthy.

8 MJ [COL HENLEY]: Right but Captain McCarthy is no longer here,
9 correct.

10 TC [LTC VANDEVELD]: That's correct.

11 MJ [COL HENLEY]: He has departed.

12 TC [LTC VANDEVELD]: That is correct.

13 MJ [COL HENLEY]: Are you aware of a standing order which
14 prohibits any JTF person from talking to the defense counsel absent
15 an order of the commission.

16 TC [LTC VANDEVELD]: I am not Your Honor.

17 DC [MAJ FRAKT]: Your Honor on Monday we called Captain Meneley
18 and asked if we could talk to him, he said he was specifically had
19 been told that he could not talk to the defense. He would need
20 permission from the SJA. We called the SJA Office; they said they
21 will get back with us in the morning. They called us Tuesday morning
22 and said you do not have permission to speak to Captain Meneley

1 without a court order. This was confirmed by Commander Martin the
2 new SJA, so it does not appear that the policy has changed.

3 MJ [COL HENLEY]: Why don't we do this as soon as the commission
4 closes, contact the current SJA for JTF confirm that no such order
5 exists and if that is the case next time any defense counsel wants to
6 interview JTF personnel. The response should not be I am only going
7 to do it if there is an order of the commission. You can't force
8 them to talk but I can say no commission order is required.

9 TC [LTC VANDEVELD]: I understand Your Honor, I will do that.

10 MJ [COL HENLEY]: Okay.

11 DC [MAJ FRAKT]: Thank you Your Honor.

12 MJ [COL HENLEY]: All right. Colonel Vandeveld anything we can
13 address from the government side?

14 TC [LTC VANDEVELD]: No, sir.

15 DC [MAJ FRAKT]: Can we have one moment to confer with my
16 client. Your Honor, Mr. Jawad and the entire defense are interested
17 in if you have any timeline for anticipating issuing a ruling on the
18 four pending motions to dismiss.

19 MJ [COL HENLEY]: Well my goal at least get the rulings at the
20 time of or shortly thereafter the next session. I don't know if the
21 findings of fact will be contemporaneous with the ruling.

1 DC [MAJ FRAKT]: Well you are really keeping us in suspense
2 here, Your Honor. I mean the speedy trial clock is, in our view has
3 already expired on this case.

4 MJ [COL HENLEY]: Are you ready to go to trial 25 September
5 assume for argument----

6 DC [MAJ FRAKT]: I am ready for the charges to be dismissed.

7 MJ [COL HENLEY]: Assume for argument that the commission does
8 not dismiss the charges are you ready to go to trial on the 25th?

9 DC [MAJ FRAKT]: We will be ready for the Unlawful Enemy
10 Combatant hearing, if the commission is directed.

11 MJ [COL HENLEY]: That may well be, but that wasn't the
12 commission's question.

13 DC [MAJ FRAKT]: That will very much depend on the discovery
14 request, response that we get Your Honor. I am not able to say at
15 this time.

16 MJ [COL HENLEY]: Anything else.

17 DC [MAJ FRAKT]: Nothing further.

18 MJ [COL HENLEY]: The commission is in recess.

19 [The military commission recessed at 1054, 14 August 2008.]

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